MASTER’S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

Netta Naumanen-Madeira

EVIDENTIAL STANDARDS IN CASES CONCERNING PAST PERSECUTION UNDER THE EUROPEAN FRAMEWORK FOR INTERNATIONAL PROTECTION

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Author: Netta Naumanen-Madeira
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Abstract:

This study responds to the need to clarify the content and scope of evidential standards – the burden of proof and the standard of proof – in cases of international protection where the applicant has been persecuted before applying for asylum. The approach to evidence in cases of past persecution has fueled discussion among legal practitioners, and diverging approaches have emerged in the court practice of European states.

The European Court of Human Rights has addressed on the issue of evidential weight attached to past persecution in its recent judgements. The inspiration for this development has its background in European asylum law, which has emerged within the Common European Asylum System of the European Union. First, this thesis examines and analyses the current content and scope of the standards in cases concerning past persecution in the practice of the ECtHR and CJEU by use of legal dogmatics. The analysis is carried out in order to have a framework for the examination of national systems.

Secondly, this thesis examines the practice in two selected European states, Germany and the United Kingdom. It analyses the ways in which evidence is approached in cases of past persecution in the practice of the appellate courts of these selected states and examines the way in which the evidential weight to past persecution is provided in the assessment. By bringing under comparison the approaches in these selected countries, this thesis concludes that the legal tradition impacts the evidential method.

This thesis argues that the reason behind the difference in approach is that as part of the practice national courts apply evidential tools that provide the best fit in their own legal culture. Also, a key feature in the difference of an approach is whether the assessment is regarded to include separate stages or whether it is approached as a holistic one on which no legal outline exists. Finally, this thesis highlights that procedural quality ought to be taken as a leading principle in adjudication of cases of past persecution in order to guarantee the legal certainty in decision making which concern applicants whose positions differ in substance as well as procedurally due to past grievances.

Key words:

Past Persecution, European Asylum Law, Non-Refoulement, Common European Asylum System, Burden of Proof, Standard of Proof

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1. Introduction

1.1. Research Problem and Limitations

Although evidential questions are of paramount importance for the determination of eligibility for international protection, the legal instruments offer only a glimpse of the legal outline for the handling of the cases. The evidential value attached to claims of past persecution when reviewing the likelihood of future risk have been a particularly discussed issue by some observers, while only recently the question has been stipulated by European regional courts.[1] This thesis seeks to examine the scope and the content of the burden of proof and standard of proof in cases of international protection where the applicant claims that he or she has already been subjected to persecutory acts before applying for asylum. The central research question consequently is *how is the burden of proof allocated and what is the required degree of proof in the European framework for international protection in cases in which claims of past persecution are made, and what is the evidential value attached to past persecution in the assessment?*

The European framework for international protection can be understood in different ways. Here it refers to the practice concerning international protection of the European courts - the CJEU and the ECtHR - as well as national systems in the geographical area of Europe. However, as it would be impossible to explore the practice of all of the national systems of Europe in a limited study such as this, this study focuses only on two selected national systems: the United Kingdom and Germany. The research is carried out by exploring the burden of proof (as duty to prove facts) and the standard of proof (regarded as the quantum of evidence required for proving facts) in cases concerning international protection by the above mentioned two major judicial bodies, and secondly, in the practice of appellate courts of the selected states. The underlying idea is to analyse the two European courts as regards their approach to the burden of proof and the standard of proof in cases of past persecution in order to have a framework for the examination of national practice.

The present writer recognises that the European framework for international protection is affected also by the United Nations system, and thus by the norms developed within that system. However, an examination of the UN Refugee Convention is excluded given that binding legal

[1] By European regional courts I here refer to the European Court of Human Rights (hereafter, ECtHR) and the European Court of Justice (hereafter, CJEU).

material concerning evidential standards is lacking in international refugee law. Although it is true that the practice of the Committee supervising the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also contributed valuable quasi-legal material concerning *non-refoulement* in cases concerning past torture, this material has similarly been excluded from this thesis.

The reason for the selection of the United Kingdom and Germany within the scope of this study is that national practice as a representative of different legal systems – common law tradition and civil law tradition respectively – contributes to the understanding of the use of evidentiary standards in different procedures. It has been acknowledged that principles and interpretation in the area of refugee law evolve in the work of judges.[2] Then again, the legal tradition has the potential to impact on the judges' work as normative agents. This is so because the judges tend to seek interpretative aid in asylum law issues from legal systems that share a common heritage and culture, which consequently provide an easier fit for the domestic context.[3] The underlying hypothesis in this study consequently includes that exploring the practice of national courts from different legal traditions brings additional insight to the question of burden and standard of proof in cases concerning past persecution when it is approached on the one hand from the view point of an adversarial system, and on the other hand as approached by an inquisitorial system. In addition, the selected countries had already adapted themselves to a high number of asylum claims before the peak year in Europe in 2015, which is why their asylum procedures and evidential approaches are well-developed. The present writer acknowledges that the UK is currently withdrawing from the European Union legal framework. The purpose of this thesis is, nevertheless, not to study the implications of EU legal standards in UK practice as such, but to present the UK as an example country building on common law principles.

Evidential questions in asylum law have not gained as much attention as research concerning the substantive questions. Specifically related to the present research, mention needs to be made of a doctoral thesis written by Ida Staffans,[4] in which the use of evidence in European asylum procedures and the use of evidential standards has been researched. However, research that would focus concretely on the question of past persecution and its impact on evidential rules

[2] Lambert 2009, p. 350.
[3] Lambert 2014, p. 204 and p. 208. As exemplified in an empirical research by Lambert (assisted by Husain) the UK courts have drawn interpretative aid in asylum cases from other Commonwealth countries and USA, instead of European ones, because of their common legal heritage and culture. Lambert and Hussain 2010, pp. 131-140.
[4] Staffans, Ida: Evidence in European Asylum Procedures, 2011.

has not been conducted in any form, including the timely developments on the issue in the case law of the ECtHR and the CJEU.

The present writer finds this study to be important because in a similar vein to other legal fields, asylum law requires specific legal thresholds in order to ensure the cornerstone principles of a legal system, those of foreseeability and legal certainty. It has been noted that the role of the past persecution in the assessment of future risk has been debated: diverging views in national practices have further muddied the waters around the issue. Challenges are increasing as the norms in Europe evolve in cross-border legal dialogue in between countries of differing legal cultures where no single model for asylum procedures exist. Precision is needed to clarify the current legal framework concerning evidence in cases concerning past persecution, as without such clarification a risk of inconsistency in the application of evidential standards is increased. Taking into consideration the importance of the issue, especially for the applicant, ambiguity in handling evidence is legally speaking an unacceptable result. The study also has additional value across the regional legal space of Europe, because European asylum law is diffusing worldwide and functions as an important source for transnational refugee law making.[5]

1.2. Methodological Considerations and Sources

The principle method in carrying out this research is legal dogmatics. The aim is consequently to systemize and analyse relevant legal material in order to find its content with the help of legal sources. This research thus focuses on an objective analysis of the current content of law and does not entail *de lege ferenda* type of argumentation. From the perspective of sources of law, this study focuses predominantly on the jurisprudence of the European courts when exploring the regional legal material. In the context of the ECHR, the ECtHR has been specifically given the role to interpret and apply the Convention, and give final judgements with binding force[6]. In cases of European Union law, this research recognises its separation from international and national law and notes it as *a sui generis* in which preliminary rulings form an important source of law in addition to written statutory law.[7] Interpretational aid of these sources of law derives from the principles developed in the jurisprudence of these courts, which will be noted in identifying the content of law. The second part of this thesis consists of national jurisprudence and is based on statutory law and case law of selected national asylum appellate procedures,

[5] Lambert 2014, pp. 203-214.
[6] As stipulated in ECHR Art. 32(1) (Jurisdiction of the Court) and Art. 46 (Binding force and Execution of Judgements).
[7] Laakso 2012, p. 278 and p. 285.

mainly those of the courts of higher instance due to their authority and power in developing norms.

As noted by Staffans, the vagueness in legal norms concerning evidentiary issues poses some limits to use of strict legal positivism as to the sources of law.[8] This is evident when defining the content of the burden of proof. Thus, the sources of law in defining the contours of the burden of proof go beyond what is recognized as formal sources of law within legal positivism, such as to considerations of what can be expected in given circumstances, which affects for instance how much proof is required from the parties. These questions will be approached in the light of customary law and court practice.

In this research the legal dogmatic method is coupled with the comparative method. The aim of this study is not to provide thorough analysis of the content of the national laws on asylum, but to unveil the effect that claims of previous persecution has in the assessment of future risk in the practice of the selected national asylum systems and whether they differ. Also, the standard of proof, which on a terminological level is often established semantically or statistically, does not as an isolated concept provide much practical information as to why studying its implications is best conducted by way of comparison. Additionally, the comparative method can bring information on the import and export of legal ideas and give insight to the role of national traditions shaping European standards which, as noted above, have a transnational effect on a wider scale.

[8] Staffans 2011, p. 11.

2. The Evidential Standards in Cases of *Non-Refoulement* with Claims of Past Persecution under the ECHR

2.1 The Review of *Non-Refoulement* Cases under the ECHR

The European Court of Human Rights (hereafter, ECtHR) is not a court that examines the eligibility of a person for an international protection status *per se* or the compliance of asylum decisions with general refugee law requirements.[9] As an international human rights court its mandate is to supervise the application of the European Convention of Human Rights (hereafter, ECHR or the Convention). Consequently, it does not seek the correct interpretation of the law but decides whether a violation of the Convention has taken place in an individual case. Moreover, the Convention does not in its textual basis contain any rights or obligations explicitly concerning matters of asylum. Nevertheless, questions concerning international protection are regularly discussed before the Court under Articles 2 or 3 of the ECHR preserving the right to life and prohibiting torture, ill-treatment and inhuman and degrading treatment respectively.[10] The Court has in its jurisprudence, starting from the famous case of *Soering*, repeatedly re-affirmed the principle of *non-refoulement,* an international legal principle that prohibits returning a person to a country where a person has reason to fear persecution, which is triggered by a decision of a State Party to remove a person to a country where he or she would be exposed to treatment contrary to Article 2 or 3 of the Convention.[11]

Even if the court does not give asylum decisions, it is faced with similar questions and issues as the national courts when deciding international protection cases. When delivering its judgement on *non-refoulement*, the key issue for the Court is to decide on the existence of a future risk of persecution. Thus the heart of the analysis of a case is uniform with domestic asylum cases. The final judgement of the Court on the existence of a risk is binding in a given case, but additionally –and crucially – forms and provides standards for Contracting Parties to follow when delivering their own judgements generally. These standards, forming a part of the 'complementary protection framework' can extend states' protection obligations in asylum matters beyond the boundaries of international refugee law.[12] The evidence assessment in the refugee determination process (hereafter, RDP) conducted at the domestic level is consequently

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[9] *M.S.S v. Netherlands and Greece,* Judgment (Grand Chamber), 21 January 2011, paras 286-287.
[10] Spijkerboer 2009, pp. 49-52. It has also been argued by some observers that other articles of ECHR can bear relevance in cases of *non-refoulement*. See den Heijer 2008, pp. 277-314.
[11] *Soering v. United Kingdom*, Judgment (Plenary), 7 July 1989, paras 87-90.
[12] Complementary protection here refers to "international legal instruments and custom that complement or supplement the 1951 Refugee Convention" based on typology of Goodwin-Gill and MacAdam 2007, p. 285.

influenced by these standards and practices, which applies in a very central way also in cases concerning past ill-treatment.

The rationale behind the Convention system is that it is subsidiary to the national courts: the State Parties have had an opportunity to prevent or redress alleged violations on their own before an issue can be brought under the Court's review.[13] Also, the Court has explicitly noted that the right to control the movement across the borders of foreigners is on the Convention Parties.[14] Because of the principle of subsidiarity, the questions of evidence and facts in asylum cases are predominantly assessed in national fora by the domestic authorities who to begin with have had "an opportunity to see, hear and assess the demeanour of the individual concerned" and the Court has regarded it to be particularly cautious of taking the role of a first instance tribunal of fact.[15]

However, on a national level the review process of asylum decisions by national administrative appellate courts can vary in intensity from a full review (where the administrative court replaces the decision of the administrative body with its own interpretation of law) or a less intense, even marginal one (concentrated on whether the decision is reasonable on substance or procedurally).[16] If the national courts are then reluctant to increase their power as regards their own standard of review, a risk of sidestepping the substance of the cases increases.[17] If this is the case, the scrutiny of the ECtHR can be more substantial than that of national fora. As a consequence, the Court intervenes with the procedural autonomy that traditionally would be guaranteed for the States Parties, and has found a comfortable ground to focus on whether the primary fact-finding process itself has been compatible with Convention standards.

In establishing its approach, the Court has noted that the obligation under Article 3 to protect the persons against arbitrary *refoulement* is to be "fulfilled primarily through appropriate procedures allowing such examination to be carried out".[18] In practice this has meant examining whether effective guarantees against arbitrariness exists.[19] In some cases the Court has limited its focus only on purely procedural aspects or conducted the review in limited manner, such as

[13] As ensured by including the exhausting the local remedies rule as an admissibility requirement, ECHR Article 35.1.
[14] See for instance *Saadi v. Italy*, Judgment (Grand Chamber), 28 February 2008, para 124.
[15] *J.K and Others v. Sweden,* Judgment (Grand Chamber), 23 August 2016, para 84; *R.C. v. Sweden,* Judgment (Third Section), 9 March 2010, para 52; *F.G. v. Sweden*, Judgment (Grand Chamber), 23 March 2016, para 118.
[16] Spijkerboer 2009, p. 52.
[17] *Ibid*., p. 49.
[18] *Paposhvili v. Belgium*, Judgment (Grand Chamber), 13 December 2016, para 185.
[19] *M.S.S v. Netherlands and Greece*, Judgment (Grand Chamber), 21 January 2011, paras 286-287.

assessed the quantity and quality of interviews and oral hearings, or whether the applicant has been assisted by legal presentation, counsel or an adviser or whether examinations on submitted documents have been conducted.[20]

Recently, however, the Court has more and more pro-actively focused on the actual evidence assessment. In deepening its standard of review, the Court has noted not to be bound by the findings of national courts and to use a wide range of evidence itself, collecting evidence also by its own motion.[21] The inquisitorial approach is essential for the Court, as without it its primary function "to ensure the observance by the Contracting States of their engagement to secure the fundamental rights" would be put in jeopardy.[22] The underlying rationale here is the "special character" of the Convention and its object and purpose as a treaty for the collective enforcement of human rights, which needs be interpreted and applied so as to make its safeguards practical and effective.[23] The level of the standard of review varies depending on the severity of the consequence that would follow from the breach in question. Consequently, given the irreversible nature of the harm following a violation of *non-refoulement* and because of the absolute nature of the Article 3, the Court has noted to apply *specifically rigorous scrutiny* in *non-refoulement* cases.[24] Consequently the scrutiny of the supervision of the fact finding process in *non-refoulement* cases has increased since the 1990s.[25]

[20] See for instance cases *Husseini v. Sweden*, Judgment (Fifth Section), 13 October 2011, paras 86-87; *Samina v. Sweden,* Judgment (Fifth Section), 20 October 2011, para 54; *A.A. and Others v. Sweden,* Judgment (Fifth Section), 28 June 2012, para 77.
[21] The Court has stated already in *Ireland v. United Kingdom* that in order to satisfy itself, the Court is entitled to rely on evidence of every kind, including, insofar as it deems them relevant. *Ireland v. the United Kingdom,* Judgment (Plenary), 18 January 1978, para 209; also in context of *non-refoulement F.G. v. Sweden,* Judgment (Grand Chamber), 23 March 2016, para 17; *Vilvarajah and Others v. United Kingdom,* Judgment (Chamber), 30 October 1991, para 107; the inquisitorial task of the Court is strengthened by ECHR Article 38 providing the Court the right to conduct investigations by itself in examining the applications if so needed.
[22] *El Marsi v. the Former Yugoslav Republic of Macedonia*, Judgment (Grand Chamber), 13 December 2012, para 151.
[23] These are the leading principles for the interpretation of the Convention. See Rainey, Wicks and Ovey 2014, pp. 65-66. It was also against this background that the *non-refoulement* principle was included in the ambit of Article 3 in the first place: even if the Court normally concentrates only on whether a violation of any of the Articles of the Convention has *already* taken place, the Court in *Soering* went on to rule on the existence of violations that might *potentially* happen in the future. It did so "in order to ensure the effectiveness of the safeguard provided by Article 3", *Soering*, para 90.
[24] *Adali v. Turkey,* Judgment (First Section), 31 March 2005, para 213; also *Saadi v. Italy*, on the level of scrutiny and absolute nature of the Article 3. *Saadi v. Italy,* Judgment (Grand Chamber), 28 February 2008, para 128. *Emphasis added.*
[25] Spiekerboer 2009, pp. 64-65.

When carrying its procedural quality control in this regard the Court consequently scrutinizes whether the State has conducted "rigorous",[26] "appropriate",[27] "meaningful",[28] or "adequate and sufficiently supported"[29] assessment of the applications, also when reviewing the credibility.[30] If the result is negative, the shortcomings in procedural quality can lead to a substantive violation (with or without a specifically procedural one).

2.2 The Framework for the Burden of Proof and Standard of Proof in *Non-Refoulement* Cases

As a principle the Court has established that it is for the applicant to provide evidence enough to prove substantial grounds to believe a risk of treatment contrary to Article 3 exists if the person is returned.[31]

> As a general rule, an asylum seeker cannot be seen as having discharged the burden of proof until he or she provides substantiated account of an individual, and thus a real, risk of ill treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of destination.[32]

The burden of proof of the applicant also follows from the precondition for an individual case to reach the ECtHR proceedings, that is that the applicant who is claiming to be a victim of a violation of the Convention must initiate the process.[33] Thus the primary claim must be made by the applicant, who is also to provide prima facie evidence on their case for the case to get reviewed before the Court.

In general, the Court has been rather reluctant to provide a detailed analysis of its standards of proof, even if the questions of a correct interpretation have often been a topic for discussion in dissenting opinions.[34] The degree of certainty that the adjudicator needs when reaching a

[26] *Saadi v. Italy*, Judgment (Grand Chamber), 28 February 2008, para 128.
[27] *Paposhvili v. Belgium*, Judgment (Grand Chamber), 13 December 2016, para 185.
[28] *Jabari v. Turkey,* Judgment (Fourth Section), 11 July 2000, para 40.
[29] *Salah Seekh v. Netherlands*, Judgment (Third Section), 11 January 2007, para 136.
[30] See for instance *R.C. v. Sweden*, Judgment (Third Section), 9 March 2010, para 52; *F.G v Sweden*, Judgment (Grand Chamber), 23 March 2016, para 118; The term "procedural quality control" is based on study of Brems where she analyses the level of procedural layer that has been added in some of the substantive Convention rights with variable degrees of detail and consistency, also in the *non-refoulement* context. Brems 2013, pp. 137-138.
[31] See for instance *Saadi v. Italy*, Judgment (Grand Chamber), 28 February 2008, para 129; *NA v. United Kingdom*, Judgment (Fourth Section), 17 July 2008, para 111. This principle was noted to be so well-established in the case law as to generally reflect a starting point for distribution of burden of proof in the case of *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, para 91.
[32] *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, para 94.
[33] As provided by the ECHR Art. 34.
[34] For instance *Labita v. Italy*, Judgment (Grand Chamber), 6 April 2000, Joint Partly Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupan*čič*, para 1;

decision on the existence of a future risk in the ECHR *non-refoulement* context is however clear on a terminological level: the degree of evidence acceptable for satisfying the burden of proof is evidence capable of or sufficient enough to produce “substantial grounds to believe” the existence of a real risk in the future.[35] The substantial grounds to believe refers to the level of evidence required which, when assessed as a whole, substantiates the equation of a future risk. The jurisprudence on ‘real risk’ on the other hand includes considerations of the risk in terms of its nature and scope, which consequently reflects the likelihood of the risk to eventuate.[36]

As the Court has elaborated, the applicant does not need to established ”with certitude” that he or she would be facing treatment contrary to Article 3 if returned home,[37] but the risk needs to be however “sufficiently real and probable”.[38] In principle the applicant must be able to show thus, that the consequences of the removal are not “too remote”,[39] but “foreseeable” [40]. The Court has for instance found breaches when ”high likelihood” of a risk has been found and where the risk is ”not theoretical and far-fetched”.[41] On the other hand, the Court has also ruled out that ”a mere possibility of ill treatment” would itself be sufficient[42] to trigger the principle and noted a “sufficiently real risk” may not be based on arguments that are to a “large extent speculative”.[43] However, a clear proof of the claim need not to be provided, since a ”certain degree of speculation is inherent in the preventive purpose of Article 3”.[44] What also comes clear from the jurisprudence is that the standard of proof is not modifiable by relying on State interests. The Court has specifically rejected a view that protection of national security could justify raising the standard to “more likely than not”.[45]

The required likelihood of real risk is also dependent on its personal scope: Normally a general situation of violence will not in itself entail a violation of Article 3 in the event of an expulsion

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Also Dissenting Opinion of Judge Bonello in *Sevtap Veznedaroglu v. Turkey,* Judgment (Second Section), 11 April 2000.

[35] This standard has now been used by the Court as a standard ”well-established in the case-law”. However initially the standard used by the Commission in *Soering* was ”serious reasons to believe”. *Soering v. United Kingdom*, Judgment (Plenary), 7 July 1989, para 82.

[36] Also, Spijkerboer notes that the real risk refers to the likelihood of the risk, whereas substantial grounds to believe specifies the standard of proof, which must be reached by the applicant to show the real risk exists. Spijkerboer 2009, p. 58.

[37] *Azimov v. Russia,* Judgment (First Section), 18 April 2013, para 128.

[38] *M.S.S v. Netherlands and Greece*, Judgment (Grand Chamber), 21 January 2011, para 359.

[39] *Soering v. United Kingdom*, Judgment (Plenary), 7 July 1989, para 85.

[40] *Vilvarajah and Others v. United Kingdom*, Judgment (Chamber), 30 October 1991, para 108.

[41] *Savriddin Dhurayev v. Russia,* Judgment (First Section), 25 April 2013, para 175.

[42] *Vilvarajah and Others v. United Kingdom*, Judgment (Chamber), 30 October 1991, para 111.

[43] *Bensaid v. the United Kingdom,* Judgment (Third Section), 6 February 2001, paras 39-40.

[44] *Paposhvili v. Belgium*, Judgment (Grand Chamber), 13 December 2016, para 186

[45] *Saadi v. Italy*, Judgment (Grand Chamber), 28 February 2008, para 139-140.

without "special distinguishing features" of the applicant from general population.[46] This approach was prevalent in the Court's cases throughout the 1990s until the Court started departing from it by noting that it has not ruled out a possibility that in situations of extreme violence a real risk of ill treatment can exist simply by an individual being exposed to it.[47] In *Sufi and Elmi* the Court, for the first time, found such intensity of violence and a violation of Article 3 emanating from it.[48]

Furthermore, the "substantial grounds to believe" does not indicate that a full proof is required from the applicant's side. As noted by Judge Zupančič, even if situations of past events are "cognitively never completely accessible, the 'evidentiary' problem concerning future events is far more radical."[49] Thus, as reiterated by the Court, "requesting an applicant to produce 'indisputable' evidence of a risk of ill-treatment in the requesting country would be tantamount to asking him to prove the existence of a future event, which is impossible, and would place a clearly disproportionate burden on him".[50] However, more than a mere indication of a risk is required: it is well established in the rulings of the ECtHR that in order for the Court to open the process to examine the merits of the application in the first place the case may not be manifestly ill-founded, but must raise "complex issues of law and fact".[51] The level of the required prima facie evidence is somewhat unclear. Spijkerboer notes that the level is referred to as evidence "capable of proving" that deportation would violate the Convention, reflecting a threshold below substantial grounds to believing so.[52]

In order to understand the functioning of the burden of proof in the context of the Convention in general it should be recognized that, depending on the right in question, it varies after the prima facie evidence has been adduced by balancing it against the margin of appreciation granted for the State. For instance in some of the cases, after the applicant has adduced the prima facie burden, it is for the State to provide justified reasons for the limitation of the given right, if the applicable article provides such a possibility.[53] Thus, the outcome of the case

[46] *Vilvarajah and Others v. United Kingdom*, Judgment (Chamber), 30 October 1991, paras 111-115.
[47] Compare *H.L.R. v. France,* Judgment (Grand Chamber), 29 April 1997, para 41 and *NA v. the United Kingdom*, Judgment (Fourth Section), 17 July 2008, para 115.
[48] *Sufi and Elmi v. the United Kingdom*, Judgment (Fourth Section), 28 June 2011, paras 218 and 250.
[49] *Saadi v. Italy*, Judgment (Grand Chamber), 28 February 2008, concurring opinion of Judge Zupančič.
[50] *Rustamov v. Russia,* Judgment (First Section), 3 July 2012, para 117.
[51] This is one of the primary criteria to be fulfilled in order for the case to be admissible within the meaning of Article 35.3 of the Convention. Erdal and BakIrcI 2006, p. 125 and 254.
[52] Spijkerboer 2009, pp. 61-62.
[53] This is the case for instance in the context of the right to family and private life (Art 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10) and freedom assembly and association (Art. 11) which all contain specific limitation clauses in the second paragraphs of the said articles.

depends whether the State is able to adduce its burden with regard to the legal question at hand by showing the reasons behind the necessity of the limitation to the required extent.[54] However, the principle of *non-refoulement* is an absolute principle by nature. Thus the only way for the States is to dispute the factual questions of the case.[55] Consequently, the extent to which the State must prove its allegations is dependent on the intensity of standard of review, which, as noted above, goes hand in hand with the level of scrutiny of the Court. In other words, because the scrutiny of the Court is particularly strict in *non-refoulement* cases, the level of standard of review is high and States' margin of appreciation consequently narrow. Thus, the standard of proof to "dispel any doubts" of the future risk by the State is high.[56]

Interestingly, the designation of the strict standard of review in cases concerning Articles 2 and 3 of the ECHR has led to special rules of allocation of the burden of proof.[57] Consequently, the Court has dismissed the idea to borrow an approach of the burden of proof from national legal systems when applying evidential standards and departed from the rigorous application of the so called 'whose claim' principle – a commonly accepted principle that places the burden of proof on the party who alleges something.[58] Depending on the context of the case, the Court has thus applied a flexible approach to evidence, including the standard of proof and burden of proof thereof:

> According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.[59]

In such cases the Court has used inferential evidence when the state has failed to rebut presumptions of fact, which has been accompanied by a shift of the burden of proof to the state. This kind of flexibility in the burden of proof is highly circumstantial, and as the Court has noted, is linked to the specificity of the facts, the nature of the allegation, and to the seriousness

[54] Ambrus 2014, pp. 235-236.
[55] *Ibid*.
[56] Spijkerboer 2009, p. 62.
[57] Ambrus 2014, pp. 238-240, See also Rules of the Court, Article 44C on proof.
[58] *El Marsi v. the Former Yugoslav Republic of Macedonia,* Judgment (Grand Chamber), 13 December 2012, para 151-152.
[59] *El Marsi v. the Former Yugoslav Republic of Macedonia*, Judgment (Grand Chamber), 13 December 2012, para 151

of the violated human right.[60] Naturally these cases are not to be contrasted with *non-refoulement* cases, as the above mentioned situations concern evidence that is solely in the possession of the State party. It nevertheless serves as an example of the evidential flexibility the Court is willing to employ depending on the accessibility of the evidence and the seriousness of the violation of the right. This is also the approach in *non-refoulement* cases where the availability, or more so unavailability, of the evidence mitigate the burden of proof.

2. 3 Burden of Proof as a Shared Duty

In *non-refoulement* cases the burden of proof of the applicant is limited to submitting evidence relating to the applicant's *individual circumstances* because he or she is in the best position of giving such information.[61] The requirement of sufficient procedural quality nevertheless entails a thorough assessment which the Court has noted to include "all relevant facts that were known or ought to have been known to the Contracting Party in the time of expulsion decision was taken".[62] The requirement for *due diligence* in fact finding processes has consequently developed into a principle of shared duty in the jurisprudence of the Court.

The principle of shared duty entails that the applicant's situation must be assessed "in the light of the situation".[63] Consequently, the evaluation of the applicant's general situation in a specific country is the duty of the competent domestic immigration authorities by their own motion. In addition to general security situation in the country of origin, the state carries an obligation to assess properly the risk factors, and their cumulative impact that make people specially targeted in a given situation.[64] The same approach applies in the assessment of the availability of the state protection, i.e. the ability of the public authorities of the receiving country to provide

[60] *Nachova and Others v. Bulgaria*, (Grand Chamber), 6 July 2005, para 147. The "shift of the burden of proof" to the government in this context means allocating burden on the state to provide explanations on the matter, whether concerning for instance injuries that occurred in custody or within exclusive control of the authorities or death that took place in suspicious circumstances, or cases in which state is withholding evidence in general. See for instance *Selmouni v. France*, Judgment (Grand Chamber), 28 June 1999, para 87; *Ribitsch v. Austria,* Judgment (Chamber), 4 December 1995, para 31; *Yasin Ateş v. Turkey,* Judgment (Second Section), 31 May 2005, para 659. On withholding evidence by the state, cases *Akkum and Others v. Turkey*, Judgment (First Section), 24 March 2005, para 211; *Celikbilek v. Turkey,* Judgment (Second Section), 31 May 2005, para 70.
[61] *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, para 96. *Emphasis added*.
[62] *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, para 87.
[63] *Vilvarajah and Others v. United Kingdom*, Judgment (Chamber), 30 October 1991, para 108.
[64] *NA v. United Kingdom*, Judgment (Fourth Section), 17 July 2008, para 129 and 130; elements representing such risk factors: previous criminal record and/or arrest warrant, the age, gender and origin of a returnee, a previous record as a suspected or actual member of a persecuted group, and a previous asylum claim submitted abroad. See *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, para 95.

protection.[65] The perspective of the Court is that governments are in a position to have full access to such information.[66]

This requirement does not automatically mean that the Contracting Parties carry an all-encompassing and unlimited burden. It is for the applicant to substantiate that the risk he or she faces is able to distinguish his position from the general population or community of his country, for example by showing that he or she belongs to a group that is known to be targeted[67] or that he or she is of special interest to authorities or those looking for him or her[68] "with reference to specific facts relevant to him and to the class of people he belonged to".[69] Additionally, the Court has also noted that the difficulties of gathering evidence affect both parties. Therefore, due to "obstacles faced by governments and NGOs gathering information in dangerous and volatile situations", the Court has been open for flexibility when it comes to sources used in the assessment by the State.[70]

As a primary rule it is for the applicant to claim that an individual ground exists. The states are not obliged to discover such by themselves.[71] However, if a possibility of a risk has been made aware for the examiners, the authorities should carry out an assessment of that risk by their own motion, even if the applicant themselves would not want to rely on it.[72] This exception applies in cases where the asylum claim is based on well-known general risk of which information is freely ascertainable from a wide number of sources, and especially if the asylum seeker plausibly belongs to a group that is systematically exposed to a practice of ill treatment in the said country, and there are serious reasons to believe in the practice in question.[73] The state cannot evade this responsibility even if the applicant had failed to expressly request asylum.[74] It is worth noting that the scrutiny as to whether a well-known general risk by itself can amount to a factor the state "ought to have known" has intensified in Court practice.[75]

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[65] *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, para 98.
[66] *Ibid*, para 98.
[67] *Saadi v. Italy*, Judgment (Grand Chamber), 28 February 2008, para 132.
[68] *NA v. United Kingdom*, Judgment (Fourth Section), 17 July 2008, para 134.
[69] *Azimov v. Russia,* Judgment (First Section), para 128.
[70] *Sufi and Elmi v. United Kingdom*, Judgment (Fourth Section), 28 June 2011, para 232.
[71] *F.G. v. Sweden*, Judgment (Grand Chamber), 23 March 2016, para 127.
[72] *F.G. v. Sweden*, Judgment (Grand Chamber), 23 March 2016, paras 122 and 127.
[73] *Ibid.*, paras 126-127;
[74] Thus, transferring 200 asylum seekers crossing the Mediterranean Sea onto Italian military ships and returning them to their point of departure without assessing the treatment to which the applicants would be exposed when returning violated the Convention, as the vulnerable position of illegal migrants and systematic violation of human rights was well-known or should have been well-known to the authorities. *Hirsi Jamaa and Others v. Italy*, Judgment (Grand Chamber), 23 February 2012*,* paras 131-133.
[75] In *R.C. v. Sweden* the Court relied on material on well-known general risk which was not produced by the parties and relied its inquisitorial powers in finding the case substantiated. Compare an earlier case of *NA v.*

It can be argued that what 'ought to have been known' is dependent on what can legitimately be expected from the State in a given case context. This reasoning follows from the continuum of cases of Articles 2, 3 and 4 of the Court concerning preventive operational measures to protect an individual whose life or integrity is severely at risk by another individual.[76] These cases are somewhat different from *non-refoulement,* and therefore using them as interpretative guide has some limits. However, the fundamental purpose of the obligation is the same, i.e. the evaluation of whether a due process was taking place in situations where an individual's life or integrity might be at serious risk.[77] Under this continuum of cases, the Court has pointed out the difficulties national authorities face, for instance in terms of priorities and resources, in assessing situations of risk, which is why the obligation must not be interpreted in a way that imposes an impossible or disproportionate burden on them.[78] This does not mean though that States could justify their shortcomings in carrying their obligations to protect individuals within their jurisdiction by vaguely referring to resource constraints. The responsibility of the State can emanate in less severe situations of failure in conduct of the authorities than ones with direct "gross negligence" or "wilful disregard" of the duty to protect life, for instance from an administrative framework that is not practical and effective enough in providing protection.[79] What is central then is whether authorities "failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid (that) risk", which is "a question which can only be answered in the light of all the circumstances of any particular case".[80] In terms of burden of proof, the primary burden in this continuum of cases is on the applicant, but the question of whether a due process has taken place needs to be proven by the State.[81]

United Kingdom, where in very similar circumstances the Court did not conduct such inquiry. *R.C. v. Sweden* Judgment (Third Section), 9 March 2010, para 56. *NA v. United Kingdom,* para 129.

[76] On operational special measures, see for instance cases *Osman v. the United Kingdom*, Judgment (Grand Chamber), 28 October 1998; *Opuz v. Turkey,* Judgment (Third Section), 9 June 2009 and *Rantsev v. Cyprus and Russia*, Judgment (First Section), 7 January 2010.

[77] Applying principles from another continuum of case law is nothing new in the ECHR system. Also drawing parallelism such as here can be supported by the views of Judge Thomassen, who stated in a concurring opinion in the case of *Said*: "a conclusion that an asylum seeker's account is not credible should therefore be based on a thorough investigation into the facts and be accompanied by adequate reasoning. Such an obligation does not follow from Article 6, which is not applicable to expulsion cases but flows directly from Articles 2 and 3, in my opinion. I would draw a parallel with other procedural aspects which, under the Court's case-law, can be derived from these provisions, such as the obligation to conduct an effective investigation into a homicide or into a credible assertion that someone has been subjected to treatment contrary to Article 3." See *Said v. the Netherlands*, Judgment (Second Section), 5 July 2005, Concurring opinion of Judge Thomassen.

[78] *Osman v. the United Kingdom*, Judgment (Grand Chamber), 28 October 1998, para 116.

[79] *Ibid.*, para 116; See for instance in trafficking prevention context, *Rantsev v. Cyprus and Russia,* Judgment (First Section), 7 January 2010, paras 290-296.

[80] *Osman v. the United Kingdom*, Judgment (Grand Chamber), 28 October 1998, para 116.

[81] Similarly Ambrus 2014, p. 239.

2.4 Burden of Proof, Past Persecution and the Principle of "Strong Indication"

The assessment of the Court in *non-refoulement* cases is without a doubt forward looking. However past events have been in increasing focus of the Court since past years. Since the ruling of *R.C v. Sweden*[82] the Court has put weight on particular evidential requirements in cases where the applicant has shown evidence of past torture eventually leading to a recently established principle of past ill treatment as "a strong indication" of a future risk.[83]

While it is true that the Court has placed focus on the past grievances in its earlier cases of *non-refoulement*, the principle of strong indication progressively extends the evidential weight of past torture in the assessment as a whole. In older jurisprudence of the Court previous torture constituted a factor with several others to be considered in the assessment of the future risk and was considered "of interest in so far as it may shed light on the current situation and its likely evolution".[84] However, the Court has always emphasised the present conditions which were considered decisive, not a historical position *per se*.[85] Recent jurisprudence however shows that the past ill-treatment not only constitutes merely one factor to be taken into account in the overall assessment, but conversely forms an evidential ground fact with a strong evidential value. Additionally, it also shifts the argumentative onus for the state to give weighty reasons why past violations would not anew if the applicant would be sent back.[86] In *J.K and Others v. Sweden* it has now been firmly established by the Grand Chamber itself that in cases where the principle is triggered a case in favour for the applicant is to a certain extent established, leading to reversal of the burden of proof on the future risk on the State.[87]

Triggering the principle is nevertheless "closely linked with the general questions of assessment of evidence", especially that of credibility of past events.[88] Consequently, it requires making a "generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue".[89] Gathering the evidence falls within the scope of shared burden. In practice, however, the evidential pressure falls to a wide extent on the applicant because of the nature of asylum cases relying

[82] *R.C. v. Sweden*, Judgment (Third Section), 9 March 2010.
[83] *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, paras 99-102.
[84] *Chalal v. United Kingdom*, Judgment (Grand Chamber), 15 November 1996, para 86; also *Vilvarajah v. Others v. United Kingdom*, Judgment (Chamber), 30 October 1991, paras 109-112.
[85] *Chalal v. United Kingdom,* Judgment (Grand Chamber), 15 November 1996, para 86.
[86] As noted for the first time in *R.C. v. Sweden*, Judgment (Third Section), 9 March 2010, para 55.
[87] *J.K and Others v. Sweden,* Judgment (Grand Chamber), 23 August 2016, paras 101 and 102.
[88] *Ibid.,* para 101.
[89] *Ibid.*, para 102.

often on oral evidence and because the applicant is in the best position of giving an account of his individual past grievances.

As already pointed out in the context of the standard of proof 'the substantial grounds to believe' does not require a fully convincing account. The evidential problem in claims concerning past persecutory acts are particularly challenging, in a similar manner as torture cases concerning Article 3 in general. As correctly exemplified by Judge Bonnello in the case of *Sevtap Veznedaroğlu v. Turkey*: "independent observers are not, to my knowledge, usually invited to witness the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture".[90] Critical to the idea to pose an obligation on the victim to prove his allegations with a standard "beyond reasonable doubt" (in the context of Article 3) he notes it is "as impossible to meet, as it is unfair to request".[91] On that point the Court has required that the "special situation" of an asylum seeker be considered when setting the appropriate evidential standards and giving benefit of doubt in applicant's favour.[92]

The benefit of doubt is specifically linked to a credibility assessment and a meaningful assessment of documentary evidence in the Court's case law.[93] Nevertheless, it does not apply to cases in which there are strong reasons to question the veracity of an asylum seeker's submissions to which the applicant has not provided a satisfactory explanation.[94] In general, the principle requires that the statements by the applicant do not need to be entirely credible and coherent in all terms, and overall credibility is not detracted even if some details might appear somewhat implausible.[95] It comes clear from the case law in general that the effect of dubious statements to general credibility is decided in the case context and cannot be therefore exemplified by clear, pre-stated rules of conduct. However, discrepancies and credibility concerns that relate to the core aspects of the applicant's claim can produce negative deference

[90] *Sevtap Veznedaroğlu v. Turkey*, Judgment (Second Section), 11 April 2000, dissenting opinion by Judge Bonello.
[91] *Ibid.*
[92] *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, paras 93 and 97.
[93] Benefit of doubt has been linked in explicit terms to credibility assessment but it has been referred to also in the context of material evidence, *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, paras 93 and 97. This is because, as will be noted, the material evidence required and overall credibility affect each other in the Court's case law.
[94] *F.G. v. Sweden*, Judgment (Grand Chamber), 23 March 2016, para 113; *R.C. v. Sweden*, Judgment (Third Section), 9 March 2010, para 53; *Collins and Akaziebie v. Sweden*, admissibility decision (Third Section), 8 March 2007.
[95] *N v. Finland*, Judgment (Fourth Section), 26 July 2005, paras 154-155.

when the ones not related to the core aspects fall more easily under the principle of benefit of doubt.[96]

The asymmetry in the procedure has also led the Court to assess whether the national authorities have given full consideration to the vested interests of parties, especially that of particular categories of applicants, based on their vulnerability and minority status.[97] Even if the Court on a terminological level refers to 'a special position' and difficulties to gather evidence, it can also be contrasted to the vulnerability framework of the jurisprudence. In this continuum of law, the Court has regarded asylum seekers as a vulnerable group *per se* in need of special protection and highlighted the specific needs of asylum seeker children related in particular to their age and lack of independence, but also to their status.[98] In addition to recognizing vulnerable groups in general, the Court's general approach to inequalities and discrimination is not limited to a formalistic assessment where the disadvantaged position is contrasted between comparative groups, but moved towards recognition of a substantial disadvantage approach which focuses also on structural inequalities.[99] Also, even if in the context of assessing the likelihood of a future risk, the Court has noted in the context of *non-refoulement* that vulnerability of a person can render from a disadvantageous position, such as from a marginal, isolated position in society.[100] It can be argued thus that the "special situation of an asylum seeker" requires *due diligence* in assessing factors of vulnerability if the position as a witness of a case is generally disadvantageous as can be in some cases of torture victims. Also, the Court's approach in *F.G. v. Sweden* supports this reading.[101] Naturally the vulnerable status reflects also on the assessment of the level of the risk in general: the applicant is not required to show extensive "special distinguishing features" to be at risk personally if he or she is a

[96] *M.O. v Switzerland,* Judgment (Third Section), 20 June 2017, para 75.

[97] Brems 2014, p. 154.

[98] *M.S.S v. Belgium and Greece*, Judgment (Grand Chamber), 21 January 2011, para 251; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Judgment (First Section), 12 October 2006, para 55; *Popov v. France*, Judgment (Fifth Section), 19 January 2012, para 91. Moreover, the benefit of a child might come to play within the context of international protection if the case raises questions under Article 8. See for instance the case of *Ejimson v. Germany*, on balancing family unity and the benefit of the child in context of removal decisions *Ejimson v. Germany*, Judgment (Fifth Section), 1 March 2018. See also *Paposhvili v. Belgium*, Judgment (Grand Chamber), 13 December 2016, on Article 8 in relation to the duty to investigate aspects of the personal and family situation of an asylum seeker in cases of removing seriously ill persons.

[99] The Grand Chamber judgement in the case of *D.H and Others v. the Czech Republic* (13 November 2007) provides a clear example.

[100] *Salah Sheekh v. the Netherlands*, Judgment (Third Section), 11 January 2007, paras 140-148.

[101] In *F.G. v. Sweden* the Court notes that "having regard the vulnerability of the asylum seekers", if the authorities are made aware of a risk factor, it needs to be taken into account *ex propio motu*. *F.G. v. Sweden,* Judgment (Grand Chamber), 23 March 2016, para 127.

member of a group systematically exposed to a practice of ill treatment when the general situation of violence in a country makes this risk likely to happen.[102]

If oral claims of past persecution are been accompanied by forensic certificates, such written evidence is given high probative value. Certificates can amount to a decisive factor even when general credibility is disputed because they create a strong presumption of past ill-treatment which cannot be rebutted by relying only on vagueness in applicants' statements.[103] When such an indication arises, it falls under the duty of the State to ascertain all relevant facts by obtaining additional evidence.[104]

The general approach of the Court is that the weight given for material evidence correlates with the assessment of general credibility, to which the timeframe in the submission of evidence can have an effect. Nevertheless, general time limits in the procedure should not be so short, or applied so inflexibly, as to deny an applicant the "realistic opportunity to prove his claim".[105] A real opportunity to prove claims can be deprived also by simply maintaining that, as being copies, the material submissions would not have any probative value.[106] Therefore, also the lack of direct documentary evidence cannot be decisive factor[107], as "demanding proof to too high of a standard may well present even an applicant whose fears are well-founded with a *probatio diabolica*".[108] As a main principle it is, nevertheless, incumbent on the applicant to adduce the material and information to the greatest extent practically possible and within the formal requirements and time limits as stipulated in domestic law.[109] A failure of the applicant to submit evidence, for instance, on his or her personal background can negatively affect the applicant's general credibility.[110] This notion extends however both ways, as credibility issues

[102] *NA v. United Kingdom*, Judgment (Fourth Section), 17 July 2008, paras 116-177.
[103] *R.J c. France, Judgment (Fifth Section) 19 September 2013,* paras 42-43; Similarly in *R.C v. Sweden,* where the forensic report requested by the Court turned the case in favour of the applicant irrespective of internal inconsistencies in the oral account. *R.C v. Sweden* Judgment (Third Section), 9 March 2010, para 52.
[104] *R.C v. Sweden*, Judgment (Third Section), 9 March 2010, para 53.
[105] *Bahaddar v. Netherlands*, Judgment (Preliminary Objection) (Chamber), 19 February 1998, para 45; Similarly in *Jabari v. Turkey*, a strict time limit to lodge applications constituted a violation of Article 3 Judgment (Fourth Section), 11 July 2000, paras 27 and paras 40-41.
[106] *M.A. v. Switzerland*, Judgment (Second Section), 18 November 2014, paras 59-69.
[107] *J.K and Others v. Sweden*, Judgment (Grand Chamber), 23 August 2016, para 92.
[108] *M.H.Mawajedi Shikpohkt and A.Mahkamat Shole v. the Netherlands,* admissibility decision (Third Section), 27 January 2005*,* part B2: The Court's assessment, application of the above principles. *Probatio diabolica* means a legal requirement to present impossible proof.
[109] *Said v. Netherlands*, Judgment (Second Section), 5 July 2005, para 49; *Bahaddar v. Netherlands*, Judgment (Preliminary Objection) (Chamber), 19 February 1998, para 45.
[110] *Said v. Netherlands*, Judgment (Second Section), 5 July 2005, paras 15 and 53. See for instance the admissibility decision of *Nasimi v. Sweden* called into question the veracity of the applicant's statements due to raising central claims after a year of applying asylum and documentary evidence only after rejections of his claim. *Nasimi v. Sweden*, admissibility decision, Court (Fourth Section), 16 March 2004.

can also affect whether a lack of material evidence is held against the applicant.[111] This is because the material evidence required varies according to what can be "reasonably expected" from the applicant.[112] These rules apply also in the context of past persecution, even if the Court's jurisprudence has not been entirely consistent on this regard. In *Cruz Varas* the Court called into question applicant's overall credibility, since the applicant had brought the torture to knowledge of the authorities only 18 months after the first interview, and since then there had been continuous changes in his statements.[113] In *Hilal,* on the other hand, the Court found it less significant that the applicant had not mentioned past torture in his first immigration interview and assessed it as one factor.[114] As noted previously, the Court has recently become more proactive and has employed a higher level of scrutiny in *non-refoulement* cases. It must be highlighted thus that the *Cruz Varas* judgement dates back to the early 1990s and can merely reflect the Court's earlier and outdated approach on the matter.

Nevertheless, the burden of proof of the applicant on past persecution should be placed so that the position of the State to assess the asylum seeker's individual situation is not entirely endangered. This, as noted by the Court, can happen if proof is missing on the applicant's identity and in addition the statements provided to substantiate the asylum request give reason to question the credibility.[115] In such cases it should be expected that the applicant substantiates substantial and concrete evidence, for example on the applicant's past activities or belonging to a group in respect of which reliable sources confirm a continuing pattern of ill treatment, a pending arrest order, or other concrete difficulties with the authorities concerned, that indicate exposure to a risk of ill-treatment again.[116] The question of credibility is assessed differently if the claim on past torture is not disputed. The practice of the Court reveals that when the principle of strong indication is triggered, other facts of future risk can and should be accepted even if they carry lower evidential value.[117] It has been criticized thus that the credibility

[111] Spijkerboer 2009, p. 61.
[112] *Said v. Netherlands*, Judgment (Second Section), 5 July 2005, para 51.
[113] *Cruz Varas and Others v. Sweden,* Judgment (Plenary), 20 March 1991, paras 77-82.
[114] *Hilal v. the United Kingdom,* Judgment (Third Section), 6 March 2001, paras 64 and 66-67.
[115] *I v. Sweden,* Judgment (Fifth Section), 5 September 2013, para 62.

[116] *Ibid.*, para 62. Similar approach was taken in the case of *D.N.W v. Sweden*, where violation was not found because of low evidential value of other facts concerning future risk. *D.N.W v. Sweden*, Judgment (Fifth Section), 6 December 2012.

[117] As noted in the Dissenting Opinion of Judge Ranzoni in *J.K and Others v. Sweden,* "the principle weight, balancing thus with evidence, which without it would carry less probative value to an extent shifting the responsibility to rebut the statement. If such value would not exit, the shift in burden would not take place so quickly. Consequently, because evidence in *non-refoulement* cases mainly consists of oral claims, this in practice would mean accepting statements concerning future risk as fact even if they generally carry weaker credibility." Judgment (Grand Chamber), 23 August 2016, para 9.

standard is simultaneously set lower than normally.[118] It is true that while the ground facts consisting of oral evidence are assessed as whole, it is unpreventable that facts of lower value are included in the final assessment because of balancing acts and thus remain in the equation. Presumably then, ruling out facts from the final equation would require rather considerable disparities in applicant's statements.

The scope of the burden of proof of the State after the onus has shifted is open to a number of questions of interpretation. Drawing from the case law, especially that of *J.K and Others*, the burden is not substantiated by referring to a general possibility of state protection in the receiving country, but would additionally include assessment of the general situation in the receiving State as well as the extent of threat from the actors of persecution in the given context. Additionally, the level of improvement of the security conditions should reach a threshold of "substantial".[119]

[118] Ibid.
[119] *Salah Seekh v. Netherlands, Judgment (Third Section), 11 January 2007,* paras 147-148.

3. Evidential Standards in Cases with Claims of Past Persecution in the EU Asylum Acquis

3.1 The Framework for the Burden of Proof under the CEAS

In addition to the ECHR framework, another set of standards concerning international protection have been adopted in European regional legal space under the European Union framework along with a creation of the area of freedom, security and justice, aiming for "an open and secure European Union".[120] Launched by the Treaty of Amsterdam 1999, in terms of the now abolished, past pillar structure, immigration and asylum matters were removed from the third pillar, an area where decisions were made on an intergovernmental basis, into the first pillar, under the Community competence.[121] Consequently, a process towards the Common European Asylum System was embarked aiming for harmonized asylum practices among the member states, which would guarantee "full and inclusive application of the Geneva Convention […] maintaining the principle of *non-refoulement*".[122] Thereafter the Union has taken increasingly dynamic steps towards unified practices on the policy area and adopted a set of legal measures in order to reach its goals.[123]

The Qualification Directive[124] (hereafter, QD), with an objective "to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection",[125] is the main instrumental tool guiding the determination process as to whether an applicant qualifies as a refugee or as a person eligible for subsidiary protection, the latter being a complementary and additional protection type existing in EU law covering situations which fall outside the refugee definition but where a protection need nevertheless arises from "real risk of suffering serious harm" if returned.[126] The main definitional difference between the eligibility requirements for these two statuses is that the so-called nexus requirement has been omitted from subsidiary protection, meaning that in such cases the serious harm in the future does not need to be linked to pre-determined grounds, such as political opinion or religion, and

[120] Presidency Conclusions from Tampere European Council meeting, 15 and 16 October 1999, para 4.
[121] Lavrysen 2011, pp. 228-229. Before the treaty of Amsterdam, the Maastricht Treaty brought matters concerning asylum under the EU competence as part of Justice and Home Affairs. The three-pillar structure of the Treaty on the European Union was abolished by the Treaty of Lisbon.
[122] Presidency Conclusions from the Tampere European Council meeting, 15 and 16 October 1999, para 13.
[123] See on this more in detail Lavrysen 2012, pp. 231-238.
[124] Directive 2011/95/EU of the European Parliament and of the Council, 13 December 2011, Recast, OJ 20.12.2011, L 337/9. Hereafter, Recast QD.
[125] *Ibid,* the preamble.
[126] *Ibid,* Articles 1 and 2.

can also arise from indiscriminate violence.[127] These two statuses also function as the primary source for the identification of the material facts of the case, i.e. the theme of proof.

The QD is an exceptional instrument as it provides explicit provisions for the "assessment of facts and circumstances" in its Article 4, while questions of evidence have been entirely unregulated area in written asylum law. It thus guides the process of establishing the facts of the asylum applications and making a prognosis risk assessment. The procedural requirements for the assessment procedure are regulated under the Asylum Procedures Directive (hereafter, recast APD) which complements the QD.[128] Especially the requirements for the examination of the applications, as contained in Article 10 of the APD, are of great importance from this perspective.[129] It includes fundamental principles on due process, quality of evidence, and other factors which link to evidence assessment. Guiding rules concerning evidence and the distribution are laid down in Article 4 of the QD. This position is confirmed by the CJEU, which has specifically noted that the purpose of the QD has not been to prescribe the procedural rules or determine "procedural safeguards" which must be afforded to the applicant, but to lay down criteria for substantive conditions which must be met in order to qualify for international protection.[130]

At the time of writing both instruments - the QD and the APD - are under negotiations as part of the overall reform of the CEAS,[131] including Article 4 of the QD. The suggested changes do not only concern the substance of these directives but also their legal effect, as the proposal includes replacing the current directives with regulations. The direct applicability attached to the regulations is hoped to fill consistency gaps which now are prevalent among the Member States' asylum practices.[132] The suggested changes concerning the ambit of Article 4.4 which stipulates rules on evidence concerning past persecution are discussed further in this study.

[127] See more specifically from the QD: the definition of a refugee in Article 2(d) of the QD is identical to the definition in the Geneva Convention. The definition for subsidiary protection is laid down in Article 2(f) and Article 15 of the QD read together.

[128] Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 (recast), OJ 29.6.2013. L 180/60, hereafter Recast APD. The Recast QD and the Recast APD are therefore complementary to a wide extent.

[129] See Recast APD, Article 10.

[130] CJEU, C-277/11, *M.*, 22 November 2012, paras 72-73.

[131] Initially the harmonization process of asylum procedures was to be made in two phases, eventually leading to unified practices by 2012. However at the time of writing the CEAS is in a state of flux due to a sudden and considerable raise in the amount of asylum applications in Europe during the year 2015, which exposed a number of structural weaknesses of the system and led to a need to introduce a third phase for the CEAS process. See more on this Communication from the Commission to the European Parliament and to the Council 6.4.2016 (COM 2016) 197. pp. 2-6.

[132] Proposal for a regulation of the European Parliament and the Council, COM (2016) 466 final, pp. 6-9; Proposal for a regulation of the European Parliament and the Council, COM (2016) 467 final, pp. 3-4.

In Member States the directives of the CEAS are applied in an administrative legal procedure in the context of RSD.[133] A distinctive feature of the administrative procedures is that the traditional view of the burden of proof does not fit easily into it. The burden of proof in its strict sense (as legal burden) has no central standing in such procedures, where the burden of proof is centralized around the concept of the "duty to substantiate".[134] Also, the standard of proof in the administrative context works flexibly, taking into account the consequences of the decision, and the duty to disclose facts (of the applicant) and the duty to investigate (of the authority) are dependent on the actual possibilities of the parties to submit material.[135] In addition, the duties of the parties can be reduced as a consequence of the court's role in carrying its own investigations, which depends on whether the court itself is under investigative duty to find the material truth of the case.

Moreover, because of the principle of procedural autonomy, EU law allows a wide margin of appreciation in assessing evidence for states.[136] Also, a wide margin arises from the nature of the Court: the CJEU is not a fact-finding body, it has specifically noted in its ruling concerning asylum that it is for the national court to establish the facts.[137] Generally the type of decision making in the EU administrative legal context relies on the generation of information by multiple institutions at the national and EU levels.[138]

As noted in the previous chapter, the nature and the objective of being an international human rights court play a central role in proceedings concerning *non-refoulement* within the ECHR system. The Court's objective to safeguard protection of human rights produces effects on the rules of proof which it applies in an autonomous and a flexible manner. The role and the aims of the CJEU are different. The primary task of the CJEU is to interpret European Union law, and its judicial nature and principles of interpretation generally differ from that of the ECtHR.[139] Similarly to the ECtHR, the CJEU is not called upon resolve disputes in asylum matters or to decide on the validity of national asylum laws. Also, the fundamental rights framework of the EU places increasing focus on human rights perspectives. It is worth noting that the fundamental rights framework is the only binding framework in the world containing a specific

[133] Staffans 2011, p. 26.
[134] Mäenpää 2007, p. 374.
[135] See Tarkka 2015, pp. 514-532.
[136] Staffans 2011, pp. 53-55.
[137] CJEU, C-31/09, *Bolbol* (Grand Chamber),17 June 2010, para 40.
[138] Hofmann 2013, p. 153.
[139] Senden 2011, pp.35-39.

right to asylum.[140] Nevertheless, the main mandate of the CJEU in asylum matters is to give instruction on the application of the CEAS instruments through the mechanism of preliminary rulings.[141]

Consequently, the EU law does not directly rule out how burden of proof should be allocated in the national administrative practice. This does not mean however that the national administrative institutions are to function without any guidance from EU administrative legal principles, which consequently have effect on the margin of appreciation granted for the Member States. Key general standards have been developed based on the general principles of EU law in this regard in the jurisprudence of the CJEU in respect to individual policy areas, which also relate to administrative activities as part of single case decision making.[142] As these principles have been developing in the context of competition law and related fields, their applicability to cases concerning international protection can have limits. Nevertheless, the guiding principles can have indirect effects also in this regard.[143]

The duty of care, one of the main administrative principles concerning the application of EU law, has a linkage with a right to a fair hearing, but also generally to "good administration" as protected by the Charter of Fundamental Rights of the European Union.[144] In the CJEU case law this principle stems as an obligation "of the competent institution to examine carefully and impartially all the relevant aspects of the individual case".[145] The principle also requires basing decisions on adequate and sufficiently precise reasoning.[146] In respect of allocation of burdens, the principle of effectiveness might also be triggered. Apportioning the burden of proof in such a way that "it is likely to make it impossible or excessively difficult for such evidence to be produced", for instance because the data needed is not in the possession of the party, is not in conformity with the said principle.[147]

[140] Article 18 of the Charter of Fundamental Rights of the European Union, Official Journal of the European Communities C 364/1, 18 December 2000.
[141] In general questions on EU law are dealt mainly under two procedures: preliminary questions by national courts based on Treaty of the Functioning of the European Union (hereafter, TFEU) Article 267 or by way of an appeal of a decision by an EU institution under Article 256 and 263 of the TFEU.
[142] Hoffmann 2013, pp. 153-155.
[143] Mäenpää 2007, p. 374.
[144] Hoffmann 2013, pp. 156-165.
[145] CJEU, C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, 21 November 1991, para 14.
[146] Ibid., para 14; Judgment of the Court of First Instance, Joined cases T-371/94 and T-394/94, *British Airways and Others et British Midland Airways v Commission,* 25 June 1998, para 95.
[147] CJEU, C-526/04, *Laboratoires Bairon*, 7 September 2006, paras 55 and 57.

It is noteworthy though that the general principles have not been considered in the context of the CEAS where procedural requirements for RSD have been explicitly laid down[148]. However, also in the international protection cases the CJEU has emphasized the requirement to assess the extent of the risk, in all cases, "with vigilance and care"[149]. Moreover, as noted above, fundamental rights have gained momentum in the EU asylum law. Especially after the Treaty of Lisbon, through which the Charter of Fundamental Rights (hereafter CFR) acquired the same legal status as the EU founding treaties, the fundamental rights in the CFR have gained more visibility and centrality in the rulings of the CJEU[150]. Because the Charter is applicable when Member States are implementing Union law, the requirements for an impartial, fair process and good administration can come into play also based on the Charter, and not only as general principles of EU law.[151] Thus, the rights to be heard and of defence have been affirmed to be provisions of general application having a broad scope in the EU legal order, including national systems to determine qualification for international protection.[152] Consequently, as specifically explained by the Court, "the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested."[153] As such the general principles and fundamental rights cross-cut the rules of asylum and effect the RDP on a very practical level.

It is also noteworthy that Article 52.3 of the CFR functions as a bridge provision, incorporating the ECtHR case law into EU law. The article stipulates that the provisions of the Charter that correspond to rights provided by the ECHR shall have the same meaning and scope, while not preventing the Union law from providing wider protection. Consequently, the intensity of the judicial review and rigorous scrutiny flowing from ECHR Article 3 are included in Article 19.2 of the Charter containing the *non-refoulement* principle, in conjunction with the bridge provision 52.3 of the Charter.

Nevertheless, the foundational aims of the European Union are addressed in Article 3 of the Treaty on European Union, one of the two founding treaties. In addition aiming at "promoting

[148] Staffans 2011, p. 55.

[149] CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others* (Grand Chamber), 2 March 2010, para 90.

[150] Ippolito and Velluti 2014, p. 158. In *Salahadin Abdulla* the Court specifically notes that the QD must be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter. See CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others* (Grand Chamber), 2 March 2010, para 54.

[151] Under the Articles 41 on right to good administration and 47 on right to effective remedy of the Charter.

[152] CJEU C-277/11, *M.*, 22 November 2012, para 85.

[153] *Ibid.,* para 95.

peace, Union's values and well-being of its people", it lists as its core objectives the establishment of the area of freedom, security and justice, internal market and the economic and monetary union.[154] Therefore, even if human rights are more influential in the EU law, the EU system is not, and was not created as human rights system *per se*, but as a federal association promoting political and economic outcomes, and none of its instruments are solely working on the realization of human rights[155]. What suffices to note here is that the context in which the EU legal instruments are borne, including those of the CEAS are not primarily targeted to enhance human rights, despite their fundamental importance in the EU framework. This point of view is relevant as meta-teleological arguments, emphasizing the object and purpose of the provisions of legislation, and EU legal principles, such as *effet utile,*[156] in addition to autonomous interpretation, have a central role in the interpretation process of the CJEU.[157] In cases of asylum law in which the compatibility of actions under the CEAS with fundamental rights have come into question, the CJEU has emphasized its autonomous interpretation of the content of fundamental right provisions, even if it has done so in the light of the ECHR, thus avoiding conflicts of interpretations with ECtHR.[158] Consequently, even if the CFR, through its Article 52.3, works as a bridge between the ECHR and EU systems, it is not a clear-cut issue that the interpretational background works *i analogi* with ECtHR rulings.[159] Nevertheless, it is also firmly established by the CJEU that the Member States must interpret their national law consistently with EU law, but also without conflicts with the fundamental rights protected by the EU legal order or with the other general principles of EU law also in the area of asylum.[160]

3.2 The Burden of Proof in the Form of Duties

It is not obligatory to place the burden of proof on the applicant under EU law: Article 4 of the Qualification Directive stipulates that Member States "may consider" providing information

[154] Treaty on European Union (hereafter, TEU), Art.3.
[155] Rosas 2012, pp. 481-482.
[156] *Effet utile* is an interpretational principle used in CJEU jurisprudence in order to ensure the effectiveness of EU law. In CJEU rulings it has close links to direct applicability of EU law provisions and supremacy of EU law over national law. See Ojanen 2016, pp. 68 and 103.
[157] Even if, as noted by Senden, in purely fundamental rights case law meta-teleological reasoning is not as visible, which can be explained by different position of fundamental rights within EU system. Senden 2011, pp. 82-89 and 391-393.
[158] See Ippolito and Velluti who provide an approach of compare and contrast for CJEU and ECtHR vis à vis ECHR and CFR in the field of asylum. Ippolito and Velluti 2014, pp. 165-175. Also as noted by McAdam, complementary protection, as borne out in the human rights framework, has a secondary role in the EU. McAdam 2007, p. 49.
[159] Ippolito and Velluti 2014, p. 166.
[160] CJEU, C-277/11, *M.*, 22 November 2012, para 93.

for the reasons of applying for asylum as an applicant's duty.[161] Nevertheless, Article 4 of the QD sets a "duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection".[162] Thus the nature of this duty reflects a burden of assertion and not a legal burden, as it concerns administrative conduct, and not a legal burden in a strict sense.[163] Even so, as the purpose for the submission of material is to gain a right it follows that the applicant does consequently *de facto* bear a contributory risk of passivity. [164] This follows from the position of the applicant being the sole person able to describe his or her situation and inter alia, producing evidence from it.[165] The use of 'may' clauses in the QD has led to divergent practices and transpositions of rules between the Member States. These optional rules have been suggested to be removed from the QD as part of CEAS reform.[166] It is evident from the proposal that the aim of the change is to place obligations for the applicant to adduce evidence in explicit and clear terms.[167]

Negative consequences for the applicant can also follow from the duty of cooperation contained in Article 4.2, according to which a duty to assess the relevant elements of the application, listed in the Article, is "on the member-state in cooperation with the applicant".[168] This duty can raise additional obligations for the applicant, "including, in particular, an obligation for the individual to appear before the authorities in person on a specific date, an obligation to hand over documentation and items which are in his possession and which are relevant to consideration of the application and, further, an obligation to accept that his statements are recorded".[169]

On the other hand, the duty to cooperate is explicitly placed on the State "with the applicant". The requirements of the Member State according to CJEU means:

> … in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application

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[161] See. Recast QD, Article 4.2. Noll notes that the norm provides a facultative rule of proof. It thus gives the Member State the competence to enjoin the applicant from the duty to present grounds and therefore the duty can be regarded as duty or assertion rather than general burden of proof. Noll 2005a, p 5.
[162] Recast QD, 4.1.
[163] Similarly, Noll 2005a, p. 301 and pp. 304-305; also Staffans 2011, p. 74.
[164] CJEU, Opinion of Advocate General C-277/11, *M.*, 26 April 2012.
[165] CJEU, Opinion of Advocate General, C-277/11, *M.,* 26 April 2012, para 56.
[166] Proposal for a regulation of the European Parliament and the Council, COM (2016) 466 final, p. 4, 9 and 13.
[167] See Proposal for a regulation of the European Parliament and the Council, COM (2016) 466 final, p. 9 and 13: "Article 4 (1) establishes the obligation of the applicant for international protection to substantiate the application".
[168] Recast QD, Article 4.1.
[169] CJEU, Opinion of Advocate General, C-277/11, *M.*, 26 April 2012, para 63.

> may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.[170]

Thus, the burden in EU legal praxis is 'shared'. The duty of the authorities to investigate is explicitly linked to the country of origin as well as the country of transit information, but also to information of which the Member State has the best position to gain access to material.[171] As noted from the wording of the judgement of the CJEU above, "for any reasons whatsoever" entails that the duty to investigate is triggered irrespective of the reasons of the applicant's evidential shortcomings. It is difficult to reconcile the duty to cooperate to function properly without including a duty of communication, as without providing information on the relevant material needed the applicant could remain unable to fulfil its obligations.[172] It is, however, noteworthy that the duty to cooperate, currently formulated as a duty of a member state with the applicant, is proposed to be reformulated by referring explicitly to the applicant only.[173] The terminology in the final regulation is naturally still undecided, but the current proposal clearly implies that the legislative intent is to emphasise the evidential obligations of the applicant.[174] It is noteworthy that the omission can also in theory undermine the principle of a shared duty in the assessment. This type of restrictive approach would consequently mean a fundamental change in approach. It needs to be emphasised that such an approach would be incompatible with the standards of the ECHR as well as international refugee law, but also the jurisdiction of the CJEU.

In addition to the primary principles of the applicant's duty to submit evidence and investigative duties, the EU asylum praxis also contains specific substantiation rules, which can be argued to include a use of shifted burden of proof.[175] Following from Articles 7 and 8 of the QD, the assessment of the available protection in a part of the country of the origin is the responsibility of the State. Therefore, in cases concerning internal flight alternative, the burden of proof

[170] CJEU, C-277/11, *M.,* 22 November 2012, para 66.
[171] *Ibid.,* paras 66 and 67.
[172] Noll 2005a, pp. 300-301 and p. 304.
[173] The new Article 4.1 has been proposed as follows: The applicant *shall* submit all the elements available to him or her, which substantiate the application for international protection. *He or she shall cooperate* with the determining authority and shall remain present and available throughout the procedure. See Proposal for a regulation of the European Parliament and the Council, COM (2016) 466 final, p. 31. (*Emphasis added*).
[174] As also noted in the proposal: "Article 4.1 establishes the obligation of the applicant for international protection to substantiate the application: therefore the applicant is explicitly obliged to provide all the elements available to him or her, to cooperate (…) and to remain present on the territory of the Member State throughout the procedure." Proposal for a regulation of the European Parliament and the Council, COM (2016) 466 final, p. 13.
[175] See EASO, Practical Guide, Evidence assessment, p. 3.

regarding the level and nature of the protection in the state of origin lie on the authorities.[176] However, following from Article 36 of the APD, in cases concerning "safe countries of origin"[177] the burden of proof shifts back on the applicant to submit serious grounds for considering why the country is not to be regarded as safe in his or her specific case.[178] It has to be highlighted thus that the safe country concept does not constitute a conclusive presumption.[179] This means that if an individual comes from a country considered as safe, she or he should be provided effective means to rebut such a presumption, even if the standard of proof to argue against the presumption is relatively high. The same applies also in the context of Dublin transfers within the area of the European Union. Despite the presumption of compliance, the fundamental rights obligations concerning *non-refoulement* applies in cases where the sending Member State cannot be unaware of systemic deficiencies in the asylum procedure or in the reception conditions of the receiving state.[180] What follows is that the applicant must in this context in a similar vein be given a possibility to argue against a presumption that he or she would be treated in conformity with fundamental rights in a receiving state in his or her individual case. If a real risk of being subjected to inhuman or degrading treatment as regarded in Article 4 of the Charter is well-known and systematic, the transfer ought to be cancelled *ex officio*.

Distribution or responsibilities also differ in the application of the exclusion clauses in Article 12.2 QD. In such cases the determining authority carries the responsibility to examine all the relevant circumstances before a decision excluding a person from a refugee status, and before doing so must base it on evidence giving rise to "serious reasons" to consider that the applicant has committed any of the excludable acts listed in Article.[181] This does not however mean that the applicant is not provided the means to argue contrary to the evidence, as such an approach would not be in conformity with the right to be heard and of defence, which in the EU legal order are provisions of general application having a broad scope also in cases concerning asylum.[182]

[176] Following from Articles 7 and 8 of the Recast QD, the assessment of the available protection in a part of the country of the origin is the responsibility of the State.
[177] See more on this concept and its applicability in the EU context, Cherubini 2015 pp. 82-91; Costello and Hancox 2016, pp. 418-422.
[178] Costello and Hancox also note how the concept has been used in placing greater burden of proof on applicants. Costello and Hancox 2016, p. 420.
[179] CJEU, Joined cases C-411/10 and C-493/10, *N.S. and Others,* Grand Chamber, 21 December 2011, para 101.
[180] *Ibid.,* paras, 86-103.
[181] CJEU, Joined Cases C-57/09 and C-101/09, *B and D,* (Grand Chamber), 9 November 2010, para 98.
[182] The general application of the right of defence has been noted to apply in international protection cases by the CJEU. See CJEU, C-277/11, *M*, 22 November 2012, para 85.

However due to the principle of procedural autonomy, the use of shifting burdens in EU asylum law is not self-evident. This is because the principle in practice gives a margin of appreciation for the Member States to choose the procedural means in enforcing the EU law by themselves. Also, the harmonization under the CEAS has not aimed to provide entirely detailed rules, but to leave space for the particularities in national legal systems.[183] Consequently, in a legal tradition where using shifted burdens is not common, the responsibilities of the Member State are in practice interpreted in conformity with the evidential methods that are more suitable for the legal tradition.[184] Even so, it should be highlighted that the principle of procedural autonomy is not without limits. In a similar vein as the margin of appreciation, the procedural autonomy is influenced by the general principles of European Union law as well as fundamental rights. Ever since the *Simmenthal* judgement the rationale of the case law of the CJEU has been to ensure full effectiveness of EU law and effective protection for an individual for his or her rights deriving from EU law.[185] The principles of effective and fair procedures also lie at the heart of the CEAS procedural harmonization.[186] Any national practice undermining these aims would consequently run counter the EU general principles.

3.3 The Evidential Method and the Question of Standard(s) of Proof

The evidential method of the CJEU when interpreting Article 4 of the QD can be characterized as structured. The CJEU has divided the process into two distinct phases: (1) the establishment of factual basis, which may constitute evidence, and (2) the legal appraisal of the evidence.[187] The burden of proof flowing from Article 4 also follows this logic, as only the first phase contains duties for both parties. For instance, the duty to communicate does not bind authorities in the legal appraisal of established facts: the authorities are not obliged to provide information as to whether the evidence considered relevant fills requirements of the theme of proof, because the duties in the Article 4.1 relate only to the first stage of the assessment "concerning the

[183] Costello and Hancox 2016, p. 383.
[184] See the ruling *AMM and Others*, where the UK Court notes that the procedural autonomy enables the Member States to lay down the detailed procedural rules. Consequently, the argument of the respondent that it is *not* for the asylum seeker to establish that he or she has no internal relocation alternative was considered correct, because no such obligation is specifically laid down in the APD. *AMM and others* (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC), paras 220-221.
[185] See on the procedural autonomy and principle of primacy of the EU law, CJEU, Opinion of the Advocate General, C-378/17, 11 September 2018, paras 47-67.
[186] On the objectives of procedural harmonization under the CEAS, see Costello and Hancox 2016, pp. 382-384.
[187] CJEU, C-277/11, *M.*, 22 November 2012, para 64.

determination of the facts and circumstances *qua* evidence which may substantiate the asylum application".[188]

The CJEU praxis is however silent concerning whether the appraisal of evidence in two different stages would also include two different applicable standards of proof, one that would be applicable in establishing the ground facts (in the first stage) and a second one to establish the future risk (in the second stage). Following an extensive consultation process and discussions including highly experienced judges in the asylum law field, widely differing practices as to the standard(s) of proof in asylum adjudication by EU member states have been noted. One of the reasons behind this ambivalence has been the failure to clearly distinguish two distinct stages in the assessment.[189] The German and UK practice provides a clear example of divergence of views in this regard, as will be presented further in the following chapter.[190] In terms of standard of proof, only a strong conceptual link exists between the QD and the complementary protection framework and international refugee law: the risk in the future must be "real" and the fear of it "well-founded", in other words the same standards as used in these areas of law respectively.[191] The CJEU has clarified the well-founded fear to include an assessment as to "whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear".[192]

Nevertheless, according to the QD in certain, rather limited, circumstances the applicant's duties to substantiate his or her case are considered alleviated, which can be argued *de facto* to mean lowering the applicable standard of proof when establishing the factual basis of the case. As noted, the Member State 'may' consider placing the burden of proof on the applicant as provided in Article 4.1. If the state includes such a requisite in its national practice, this duty is nevertheless relaxed in the absence of "documentary or other evidence", as provided by Article 4.5 of the QD if conditions stated in the given article are met. These requirements include that the applicant has applied for protection at the earliest possible time or has given good reasons for not doing so,[193] and that he or she has made a genuine effort in order to substantiate his or

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[188] CJEU, C-277/11, *M.,* 22 November 2012, para 68.

[189] See on this an overview, International Association of Refugee Law Judges 2013, paras 56-67 in pp.92-94; also IARJ– Europe 2016, p.80 (footnote). See also Hathaway and Foster who argue that there are no differing stages in the assessment process where intermediary findings are made. Hathaway and Foster 2014, p. 167 (footnote 483).

[190] See chapter 4 of this study.

[191] See QD (Recast) Articles 2 (d) and 4.4; 5.1-2; 8.1-2; 10.2 and 11.2. Compare section 2.2 of this study and Convention on the Status of a Refugee, Art 1(a) 2 on definition of a refugee.

[192] CJEU, Joined Cases C 71/11 and C 99/11, *Y and Z,* 5 September 2012, para 76.

[193] QD (Recast) Article 4.5(d).

her application[194] with all the relevant information, or if such information is not available, has provided a sufficient explanation for the lack of it.[195] In addition, the applicant is required to be internally coherent and plausible in his/her statements, which do not contain external contradictions,[196] and has been able to establish general credibility.[197] This provision is sometimes referred to as the benefit of the doubt principle. However, it does not reflect the principle and carries obligations that do not fit easily in the framework of international refugee law. [198] This is because the requirement for an early submission of an application does not exist in international refugee law. Also, the requirement for establishing "general credibility" may lead to conflicts with international law principles. Using the benefit of the doubt term in this context is therefore to some extent misleading.

Article 4.5(b) of the QD read together with Article 4.1 of the QD consequently provides that in the absence of material evidence the applicant is to provide a "plausible" account of his or her statements if the burden of proof is placed on the applicant by the state. This can be argued, thus, to reflect a standard of proof when the applicant delivers his oral proof, and thus a level of threshold required in terms of credibility when establishing the ground facts in the first stage of the assessment. The threshold of "plausible" can be placed somewhere between possible and probable.[199] This reading is however debatable because it would necessarily mean approving that the approach to evidence in EU law is divided into two separate stages, an approach that, as noted before, is not a clear-cut issue.

Furthermore, the QD does not include explicit rules on how specific evidential challenges should be addressed as part of the evidence assessment and standards. It is noteworthy that the approach to vulnerabilities of asylum seekers under CEAS instruments is generally speaking selective and context-dependent. Vulnerabilities are assessed on an individual basis and in the context of a given directive. Consequently, the list of specific categories of vulnerable asylum seekers, such as for instance children, elderly people or victims of past torture differ, under the directives. In the Reception Conditions Directive such selective groups are considered as persons who are in need of special reception guarantees, whereas under the Recast APD as

[194] *Ibid.,* 4.5 (a).
[195] *Ibid.,* 4.5(b).
[196] *Ibid.,* 4.5 (c).
[197] *Ibid.,* 4.5 (e).
[198] Noll 2005a, pp. 311-312; UNCHR (COM (2009) 551, 21 October 2009), p. 16; compare also UNHCR Handbook 1979, reedited 1992, paras 203-204; UNCHR Note on burden of proof and standard of proof 1998, para 12.
[199] Staffans 2011, p. 109.

groups needing "special procedural guarantees".[200] Nevertheless, the RCD also contains a clause according to which the vulnerability assessment under the RCD is done without prejudice to the assessment of international protection, consequently limiting its use explicitly to the reception context only.[201] The perspective of vulnerabilities under the APD then again is practical: the vulnerabilities are linked to the applicant's needs for special procedural guarantees, which are provided in order to remedy the hindering effect the vulnerabilities have on the applicant's ability to practice his or her rights and obligations under the APD.[202]

It is arguable if this approach is enough to provide safeguards in terms of asymmetrical evidential position. Nevertheless, the requirement of the individual assessment under Article 4.3 of the QD can be regarded to provide added value in this regard. Article 4.3 aims to establish criteria to be taken into account when considering whether the feared act of ill-treatment in the future will amount persecution or serious harm, thus affecting only evaluation of a future risk, which is more of a legal question than factual one. Thus, it is regarded as a factor to be considered when making a risk assessment, and thus something to be mirrored against the applicable standard of proof.[203] The CJEU has explicitly required for the national authorities to consider the vulnerability of the applicant when drawing its final conclusions.[204] Nevertheless, in the same context it noted that deeming the applicant not credible only because he or she does not reveal personal information quickly enough due to a vulnerable status runs counter to Article 4.3.[205] This assessment implies that the individual circumstances in certain cases also entail taking into account asymmetries in procedural power when it comes to establishing ground facts. Also, in the practice of the European Asylum Support Office, carrying a mandate to promote the harmonization of the CEAS, the background features of the applicant, such as age, gender, educational background and health, are to be considered as factors of possible distortion when assessing the sufficiency and specificity of details and consistency of the claims.[206]

[200] RCD, Article 21.
[201] RCD, Article 21.4.
[202] The preamble of the Recast APD, para 29 and Article 2(d).
[203] EASO, Practical guide, Evidence assessment, p. 21; Similarly Noll 2005a, pp. 9-10.
[204] CJEU, C-148/13, *A,* (Grand Chamber), 2 December 2014, para 70.
[205] CJEU, C-148/13, *A,* (Grand Chamber), 2 December 2014, paras 62-70.
[206] EASO, Practical guide, Evidence assessment, p. 10 and pp. 14-17

3.4 Past Persecution as a "Serious Indication"

Article 4.4 of the QD stands out as the only legally binding rule of any written body of law guiding the assessment of cases where the applicant seeking for international protection has already been subjected to acts amounting persecution. Following the article, previous persecution or harm, or direct threats of such acts, is to be considered as "serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm unless there are good reasons to consider that such persecution or harm will not be repeated".[207]

As argued in the previous section, the EU law does not directly rule out whether the method of evidence assessment should be holistic with one standard of proof or a two stage process with separate standards to establish the ground facts.[208] In this regard, the Court has only noted that "the standard of probability applies to the assessment of the extent of the risk of actually suffering acts of persecution in a particular situation, as established in the context of the cooperation between the Member State and the person concerned, to which Articles 4(1) and 14(2) of the directive refer".[209] More specifically, it merely refers to the shared duty in collecting evidence based on which the final conclusion is drawn, but nothing more than that. Consequently, because of the procedural autonomy, approaching a "serious indication" of future risk as an evidential tool can vary depending on the national practice as long as it carries extinguishable evidential weight which can only be overturned if there are serious reasons.

Similarly, according to legal writers, the "serious indication" must be given a serious evidential weight as a material fact. Staffans argues that the serious indication in the EU context refers to "a high probability" of future risk.[210] Thus, the other material needed in order to establish a risk is lower. As noted in the ECtHR context, this consequently means that the standard of proof to establish future risk is in practice reached easier. Similarly, Hathaway and Foster argue that the past persecution is to be regarded solely as means of substantiating future risk.[211] Thus, the impact limits itself to lowering the general standard of proof. Also, Noll contends that the indication is to be considered as an alleviating evidentiary rule meaning that previous experiences of atrocities "can reduce the need for a more extensive investigation and

[207] Recast QD Art. 4.4.
[208] See previous section 3.3.
[209] CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 (Grand Chamber), *Salahadin Abdulla and Others*, 2 March 2010, para 85.
[210] Staffans 2011, p. 62.
[211] Hathaway and Foster 2014, pp. 165-166.

establishment of future risks".[212] In the practice of the CJEU, the Court has referred to "the scope of the evidential value" that needs to be "attached to previous acts or threats of persecution".[213] The question was similarly approached by the advocate general, noting the "relaxation of the rules of assessment" in cases of past persecution.[214]

Thus, when the material facts of past persecution are found, what follows is the relaxation of the burden of proof regarding the other material facts of the case. Whether this relaxation is provided for the applicant or for the state depends on the nature of the other material facts and the general rules on distribution of evidence, even if as noted before it is the credibility threshold of the applicant that has the greatest effect. Differing perspectives have been raised whether the 'indication' works as a presumption of a future risk in a way of absolving the applicant's duty to cooperate with the process. If it would, it would in practice mean that past grievances could be accepted as a sole reason for future risk, an approach EU asylum law does not support.[215] This approach has been rejected by Hathaway and Foster, who argue that this type of a view is a misreading of national practice and does not have standing in EU law where the QD "sensibly avoids the language of presumption"[216].

According to the wording of Article 4.4 there must be good reasons to consider that the persecution would not be renewed in order for the state not to grant protection for the applicant. According to Hathaway and Foster, this means in practice that it must be shown why changes in circumstances create effect where past persecution may not be considered anymore as 'indication', i.e. why there is no reason to apply this rule.[217] The rule does seem thus to place more responsibilities on the state in terms of burden of proof, as the state is required to establish with a relatively high standard of 'good reasons' that past ill-treatment will not occur again.[218] Whether this rule is regarded as shifting the burden of proof depends on the national practice.

[212] Noll 2005a, p. 309.
[213] CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 (Grand Chamber), *Salahadin Abdulla and Others*, 2 March 2010, paras 100 and 101.3.
[214] *Ibid.,* para 43.3; CJEU, Opinion of the Advocate General, C-178/08, *Salahadin Abdulla and Others*, 15 September 2009, para 75.
[215] As noted by the CJEU "the fact that the person concerned has in the past been tortured by the authorities of his country of origin is not in itself sufficient justification for him to be eligible for subsidiary protection", CJEU, C-353/16, *MP (Protection subsidiaire d'une victime de tortures passées)* (Grand Chamber), 24 April 2018, para 30.
[216] Hathaway and Foster 2014, pp. 166-167.
[217] Hathaway and Foster 2014, pp. 165-166.
[218] Similarly Noll 2005a, p. 309.

It is worth taking a quick glimpse at the past legislative history when framing some general perspective on what could constitute 'good reasons' in the Article 4.4 sense. Before the CEAS was launched, the EU had touched the issue of past persecution in its guidelines on the application of criteria for recognition and admission as a refugee. The guidelines were not legally binding but were suggested to be taken as basis by the administrative bodies responsible for the recognition process. According to the guidelines the past persecution was to be regarded as serious indication "unless a radical change of conditions has taken place since then in his country of origin or in his relations with his country of origin".[219] Also, it is clear from the *travaux preparatories* of the QD that the question has not been simple during the first phase of the CEAS. The first draft prepared by the European Commission did not include obligations for the state but an entirely new standard of proof of the future risk. In contrast to the text that was finally adopted, the proposed version considered past persecution to "strongly indicate *a reasonable possibility* that the applicant might suffer further persecution or harm in the future"[220]. Moreover, the question is still not settled, as during the current reformation process of the CEAS the text of Article 4.4 of the QD is opened for negotiation. The Commission's proposal leans towards the state responsibility in a similar manner as before, whereas the Parliament is suggesting removing the section containing the obligation of serious reasons altogether.[221]

Noll notes however, that because states are under the obligation to assess cases in individual basis as provided in Article 4.3 of the QD, only altered circumstances at home country, for instance an improved security situation, cannot constitute 'good reason' to consider ill-that treatment would not renew.[222] He also suggests that "extreme" care is needed to assess if an applicant is facing a risk of ongoing persecution, meaning that the earlier victimisation for persecution would have produced such a level of damaging, traumatizing effects that simply

[219] 96/196/JHA: Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees. Official Journal L 063, 13/03/1996 P. 0002 – 0007. See paragraph 3.

[220] Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (2002/C 51 E/17) COM(2001) 510 final 2001/0207(CNS) (Submitted by the Commission on 30 October 2001) Official Journal 26.2.2002C 51 E/325, Article 7 (c).

[221] Committee on Civil Liberties, Justice and Home Affairs. European Parliament, plenary sitting 28.6.2017, A8-0245/2017, amendment 63) Report on the proposal for a regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents (COM(2016)0466 – C8-0324/2016 – 2016/0223(COD).

[222] Noll 2005a, p. 309.

returning to the home country would trigger damaging repercussions.[223] This certainly is an important notion, even if under EU law ongoing-persecution alone does not create eligibility for subsidiary protection. However, if the after-effects of previous torture would be substantially aggravated by return and lead to a serious risk of committing suicide, and additionally the applicant would be intentionally deprived of appropriate care for the physical and mental after-effects of previous torture, the eligibility for subsidiary protection is established. [224] The level and access to proper care in such a case is a matter for the national court to determine. What is noteworthy here is, however, that if the after-effects are a result of previous torture committed by the authorities of the country of origin instead of non-state actors, this alone can function as an indication that availability of the proper rehabilitation does not exist.[225]

The obligation to show a radical change in the state of origin resembles the obligations stipulated in Article 11(2) of the QD concerning cessation of a refugee status, hence it can be argued that the criteria in the Article could have analogous relevance.[226] Flowing from this reasoning, the change of circumstances should be of "such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded", which according to the CJEU means that the factors against which the fear has existed have been "permanently eradicated".[227]

In this context the CJEU has noted that Article 4.4 is applicable only on the condition that a connection has been established between the facts and the reasons of the persecution:

> … at the stage of the examination of an initial application for the granting of refugee status, when the applicant relies on earlier acts or threats of persecution as indications of the validity of his fear that the persecution in question will recur if he returns to his country of origin. The evidential value attached by Article 4(4) of the Directive to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) of the Directive, that those acts and threats are

[223] *Ibid.,* p. 310.
[224] CJEU, C-353/16, *MP (Protection subsidiaire d'une victime de tortures passées)* (Grand Chamber), 24 April 2018*,* 24 April 2018.
[225] *Ibid.*, para 57. This aspect separates torture cases form cases where substantial deterioration of health would result from other grounds and where the subsidiary protection can be triggered only if deprivation of health care is intentionally denied in the country of origin. Compare with case C-542/13, *M'Bodj*, (Grand Chamber), 18 December 2014.
[226] International Association of Refugee Law Judges European Chapter (under contract to EASO) 2016, p. 84.
[227] CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others*, (Grand Chamber), 2 March 2010, para 73.

> connected with the reason for persecution relied on by the person applying for protection.[228]

Thus, in situations of cessation, in which the circumstances on the basis of which refugee status was originally granted and have ceased to exist, it needs to be verified no other reasons for a well-founded fear exists. The previous persecution thus does not cause any changes to the scope of evidential value but causes changes only in respect to circumstances other than those on the basis of which international protection was granted before. This situation might be for instance if the person has suffered persecution before on other grounds but has not relied on them in the initial proceedings, or such persecution has taken place after leaving the country of origin and the threat originates in that country.[229] The standard of probability used to assess the risk in these circumstances is naturally the same as in the initial proceedings, and Article 4.4 can be triggered in this regard if facts of previous persecution are established and the nexus requirement is fulfilled.[230] If in the case of cessation the applicant relies on the same reasons as in the initial proceedings Article 4.4 is not applicable, but the case is decided on the basis of whether the change of his or her circumstances has been significant and non-temporary to the level required by the cessation clause in Article 11.2 of the Directive.[231]

As mentioned earlier, Article 4 guides the assessment process of international protection, which means it is to be applied also in cases of subsidiary protection. There is however a difference in the essence when the protection need is not caused by personal circumstances attached to the applicant but arises from a conflict in the country of origin. Similarly, alike the ECtHR, the CJEU has noted that a person might be subjected to a threat contrary to the directive solely on account of his or her presence on the territory if the violence taking place in the area reaches an exceptionally high level.[232] However, when the intensity of the conflict does not reach such a level, the individual's position within a circle of potential victims might still lead to protection

[228] Ibid., 2 March 2010, para 94. This condition, which as the Court in this context states stems from Article 9(3) of the Recast QD, contains the so called nexus requirement. In general it means that reasons and acts of persecution should be in connection with each other. However this applies in terms of qualification as a refugee. Without this connection a person might still be eligible for subsidiary protection under Article 15 a and 15 b of the Recast QD, because in practice the assessment of these articles differs only in terms that they do not require grounds for the persecution to be established. This leads to a question whether Article 4.4 of the Recast QD would not be applicable in this context. Nevertheless, on a textual basis, Article 4 of the Recast QD is applicable in the context of international protection and thus also in the context of subsidiary protection.
[229] CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others*, (Grand Chamber), 2 March 2010, paras 92-97.
[230] Ibid., paras 84 and 92-97.
[231] Ibid., 2 March 2010, para 98.
[232] Judgment C-465/07, *Elgafagi* (Grand Chamber), 17 February 2009, para 34.

needs. Therefore, the more there are factors particular to his or her personal circumstances that make him or her specifically affected by the indiscriminate violence in the country where he or she fears to return, the lower the level of violence is required for him or her to be eligible for subsidiary protection.[233] In this assessment, the fact that a person has already been subjected to serious harm is to be assessed, as "an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower".[234]

Then again, it is worth highlighting that the absence of a serious indication in the form of past persecution may not be considered, to the contrary, indicative of absence of future risk. The directive may not be interpreted in a way that the theoretical possibility which is open to the applicant to avoid being exposed to persecution in case of return does not affect the level of standard of proof for the future risk, even if there are no serious indications of such a risk because of absence of previous persecution.[235]

[233] *Ibid.,* paras 38-39.
[234] *Ibid.,* para 40.
[235] As noted in the cases with a question of concealing parts of the identity or restraining from expressing it in order to avoid persecution. See CJEU, C-71/11, *Y and Z*, 5 September 2012, paras 75 and 78; CJEU, C-199/12, *X and Others*, 7 November 2013, paras 64-74.

4. Evidential Standards in National Asylum Practice in Cases with Claims of Past Persecution

4.1 Germany

4.1.1 Main Features of the National Asylum Law and Procedure in Germany

The national legislation forming the basis for the refugee recognition in Germany has been widely influenced by the European developments, especially that of the CEAS. [236] However, the national legal basis on asylum nevertheless fulfils its own functions and maintains its position as a legal source because of its historical importance.[237] A particularly intriguing feature of this legal basis is the inclusion of a right to asylum into the German Basic Law Article 16a (*Grundegesetz*, hereafter *GG*). The article provides a right to asylum for "persons persecuted on political grounds", which forms an individual fundamental claim right and still today serves as a basis for a recognition for international protection.[238] What is relevant to point out here is that the *GG* in general holds the highest ranking in the German legal system. As the German system follows a civil law tradition, the binding source of law is derived from the written legal material.[239] Thus, when approached from the perspective of sources of law in German tradition, the *GG* holds a supreme position and prevails over any other source of law below, such as statutes.[240]

From its outset, the notion of 'political asylum' has been interpreted in German practice in a distinctive way from the definition of a refugee in the Geneva Convention.[241] Thus, the recognition of a refugee status in conformity with the definition of a refugee in international law was included in a different legislative act to begin with.[242] Additionally, the demands of uniform European standards introduced a wide set of additional derogation principles, such as exclusion of manifestly unfounded applications as well as applications from safe third countries, which were amended to the text of Article 16a of the *GG* restricting its scope as a

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[236] Parusel 2010, p. 8-9.
[237] *Ibid.,* p. 68.
[238] *GG*, Art. 16a (1); *Ibid.*
[239] Tiedemann 2010, p.62.
[240] Foster and Sule 2010, p. 50; see also *BVerfG 94, 49*, where the Federal Constitutional Court upholds the constitution fundamental right character of the Art. 16a.
[241] In the landmark judgement *BverfG 80, 315* the Federal Constitutional Court defined the political persecution to include acts against political beliefs, religious beliefs or other inalienable characteristics of an individual which are perpetrated by a state. See *BverfG 80, 315*, paras 1-5.
[242] Tiedemann 2010, p. 58.

claim-right.[243] Against this background, separate legal requirements for the granting of refugee status and of the constitutional right to asylum were borne out – a distinction that is still functioning today. Where the legal source for the latter is Article 16a of the *GG*, the former has been regulated under Section 60 of the Residence Act (*Aufenthaltsgesetz*, hereafter *AufenthG*), also commonly known as "small asylum".[244] The small asylum in Section 60 of the *AufenthG,* stipulates that a foreigner may not be deported to a state in which their life or liberty is under threat (paragraph 1), or where they face serious harm (paragraph 3) or danger to life and limb (paragraph 7). This general deportation ban provides an alternative means for recognition as refugees as well as persons in need of subsidiary protection.[245]

Even if Section 60 starts with a reference to the Geneva Convention, the EU Qualification Directive guides its interpretation and consequently the section is a form of protection based on European law.[246] The legal definitions of a refugee and subsidiary protection have been implemented into the Asylum Act Section 3 and 4 (*Asylgezetz*, hereafter *AsylG*) to which also the general deportation ban of the *AufenthG* refers. Besides offering the definitional background, *AsylG* carries an important role being the main instrument for handling asylum claims, because it transposes all of the European Union legal requirements under the CEAS directives into German national law.[247] All in all, currently the Residence Act (*AufenthG*) and the Asylum Act (*AsylG*) serve as the main legal sources for handling the claims for international protection. Also in practice, the European legal bases are much more important than national law with regard to the form of protection in positive decisions.[248] Overall, the impact of European legal influence is considerable in German asylum law.

In the Federal Republic of Germany both the Federal and the *länder* have their own administration of justice and, differing from other federations, also the appellate courts are state courts, except that of the highest instance, which is federal.[249] The administrative courts enforce legal claims against "public authority acts", which also include the negative decisions in RSD

[243] Foster and Sule 2010, p. 268; also Staffans 2011, p. 117.
[244] Parusel 2010, p. 38; also Staffans 2010, pp. 116-118.
[245] The "danger to life and limb" referred in the Section 60 can also stem from international or internal armed conflict, and thus despite minor differences in the wording conforms to the requirements of article 15 (c) of the QD according to the German case law. See *BVerwG. 10 C 4.09* (27.4.2010), para 20.
[246] Parusel 2010, p. 19.
[247] According to the general reference in the beginning of the *AsylG* the statute transposes into national law the main three CEAS directives, i.e. the QD, APD and the Reception Directive (2003/9/EC of 27.1.2003).
[248] BAMF keeps a monthly record on recognition rates and basis in its website. It is clear from statistics that higher numbers of positive decisions are granted under the asylum act or general deportation ban than under 16a of *GG*; also Staffans 2011, p. 118.
[249] Hailbronner and Kau 2005, p. 72.

conducted by the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, hereafter, *BAMF*).[250] The decision of an administrative court of first instance, *Verwaltungsgericht* (hereafter, *VG*), is appealable on both questions of law and fact to the court of second instance of the respective *länder*, called *Oberverwaltungsgericht* (hereafter, *OVG*) or *Verwaltungsgerichtshof* (hereafter, *VGH*).[251] A restricted appeal can be further referred to the Federal Administrative Court (*Bundesverwaltungsgericht*, hereafter *BVerwG*) with the mandate to review the compliance with federal law as a court of third instance. If the matter is of constitutional importance it can still be reviewed by the Federal Constitutional Court (*Bundesverfassungsgericht*, hereafter *BVerfG*).

4.1.2 Evidential Standards and Past Persecution in German Asylum Practice

In order to understand the functioning of the burden of proof in German asylum appellate procedures, it is necessary to recognize that the approach to evidence in German administrative practice is inquisitorial, which impacts on the evidential duties of the parties in the process.[252] The Administrative Procedure Act Section 26(2), (*Verwaltungsverfahrensgesetz,* hereafter *VwVfG*) obligates both parties to contribute to the case by disclosing facts and evidence as are known to them. The same section also provides for extra duties in ascertaining evidence to be laid down in specific acts. According to *AsylG*, the applicant is "personally required to cooperate in establishing the facts of the case".[253] Section 15 also provides a relatively detailed list of requirements of the applicant's duties to cooperate, including providing necessary oral and, on request, written information for the authorities.[254] Section 25 of the *AsylG* concerning rules for the hearing further strengthens the obligations of the applicant to present facts in the procedure.[255]

On the administrative authorities' side, Section 24 of the *AsylG* is of relevance as it regulates the decision maker to clarify the facts of the case and to compile the necessary evidence.[256] The *AsylG* does not provide instructions that are more detailed on what type of evidential material

[250] Article 19 of the *GG*; Tiedemann 2010, p. 59; Foster and Sule 2010, p. 86.
[251] See more specifically on the administrative court structure in Germany, Foster and Sule 2010, p. 86-87 and 90-91, and on institutional competence over the asylum procedure Staffans 2011, p.120-121, which at the time of writing is up to date.
[252] Staffans 2011, p. 112 and 123.
[253] *AsylG*, Section 15(1.).
[254] See *AsylG*, Section 15 (2.-3.).
[255] Under the Section 25 it is the applicant to present facts on his case and contains also rules on the consequences on producing facts on later stage, which may be ignored. See *AsylG* section 25 (1-3).
[256] *AsylG* 24(1.).

it is for the administration to collect from that of the applicant. All in all, the assessment of facts is adaptable because the evidential duties are covered by general principles of administrative action, such as *Ermessen.* The *Ernessen* principle provides means for discretion for administrative authorities to achieve the maximum of justice in an individual situation if the factual situation provides more than one possible legal consequence.[257] It guides the decision maker to pay attention in such situations to statutory objectives, to proportionality and fundamental rights considerations, and to general limitations of arbitrary decision-making.

Moreover, the principle of investigation requires the authority to take into account all circumstances of importance and denies refusing statements falling within its sphere of competence on the ground that it considers the statement or application inadmissible or unjustified.[258] Because of the inquisitorial nature, the applicant's failure to perform its evidential duties will not result in failure of the whole case. The authorities are nevertheless under a duty to ascertain the merits of the case.[259] Nevertheless, the party failing to cooperate in a case will bear adverse consequences.[260]

On the appellate stage the court bears the duty to discover all relevant facts.[261] Due to this inquisitorial nature the appellate court bears this duty *ex officio*. Consequently, it is not bound by the evidence produced and put forth by either of the parties.[262] In all of the cases which are decided under the deportation ban under Section 60 of the *AufenthG*, an oral hearing is also arranged if such a hearing is not renounced by agreement of both parties. The hearing can thus bring adversarial features into the process.[263] This is because, as noted by the Administrative Federal Court, the court only adjudicates upon a hearing if the case is essentially dependent on the credibility, because the applicant themselves is considered "as the only evidence" because of their status as a "witness in his own right".[264] The duty of the Court in fact-finding is however further emphasized in the German system through a practice of *Beweisantrag* (the motion to take evidence). This rather unique instrument provides, on the basis of a request by either of

[257] Nierhaus 2005, p. 96.
[258] *VwVfG,* Section 24.
[259] Nierhaus 2005, p.105.
[260] *Ibid.*
[261] Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, hereafter VwGO), Section 86. However according to Staffans in practice the Court's capacities in research are limited and thus this duty is balanced against the requirements of procedural efficiency. See Staffans 2011, p. 123-124.
[262] Also Tiedemann 2010, p. 60.
[263] Staffans 2010, p. 122.
[264] *BVerwG. 10 C 13.09*, (9.12.2010) para 19.

the parties, the judge a right to decide separately whether more evidence related to a specific fact is needed in order to for the fact to be established.[265]

The relaxed use of rules of evidence is a feature that is most distinctive in the German legal system when compared to others, notably that of common law.[266] Mainly this type of flexibility is a particular feature of civil law procedure. The public administration may however choose to use private law structures if it is not excluded by law. A main rule, nevertheless, is to follow public law rules and not "escape into private law" *("Flucht in das Privatrecht")*.[267] All in all, the flexible use of evidence in the German legal tradition leaves its imprints to court procedures generally. This is so even if the allocation of burden of proof (*Beweislast*) is a matter of substantive law.[268] German practice recognizes three types of burden, subjective burden of proof *("subjektive Beweislast")*, the objective burden of proof *("objektive Beweislast"),* and the burden of making sufficient assertions *("Behauptungslast")*, which all act together in differing stages of the procedure.[269] Consequently the use of evidence is structured and differing evidential methods as "evidence in rebuttal" *("Gegenbeweis")*, presumptions and reversals of burden of proof (where the burden is "moved" on the party invoking an exception), are in common use.[270]

In theory the German legal system recognizes only one standard of proof, beyond reasonable doubt (*volle richterliche überzeugung*). This standard of proof ought to be applied if a separate statute does not explicitly state otherwise.[271] Asylum cases provide a clear exception from this rule. This is because the litigation concern future facts. In these cases too the judge, nevertheless, needs to be persuaded on the future event.[272] Thus, as demonstrated by Staffans, a structured approach is applied by the German courts in the assessment of asylum cases, which is clearly divided in two stages. Consequently, differing standards of proof on a verbal level are

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[265] See more on this procedural tool as part of asylum cases, Staffans 2011, p. 126-127.
[266] Foster and Sule 2010, p. 141.
[267] Nierhaus 2005, p. 90.
[268] Siehr 2005, p. 374.
[269] Wolf and Zeibig open up all three of these ways to approach the burden of proof, where as Kokott and Staffans elaborate subjective and objective ones. See Wolf and Zeibig 2015 p. 7; Kokott 1998, p. 15; Staffans 2011, pp. 128-129.
[270] Wolf and Zeibig 2015, p. 7. Staffans elaborates the shift as an evidential method that in practice moves more responsibility towards the other party because some empirical facts or presumptions overthrow the burden. Staffans 2010, p. 131.
[271] Kokott 1998, p. 18 and 203.
[272] *Ibid.*, p. 23.

used by German appellate courts in asylum cases, one concerning past facts and the other concerning future ones.[273]

As examined by Staffans, the standard of proof used in the first stage, i.e. in establishing the ground facts (usually through credibility assessment) is set high.[274] Drawing form her study this standard has been formulated as "*überzeugung*", (convinced), a similar standard which is used in German civil procedures in general. The standard refers a higher standard than "preponderance of evidence".[275] Consequently, she argues that the standard of *volle richterliche überzeugung* can be taken as a starting point for the standard of proof when establishing past facts.[276] This means consequently that when the applicant is to establish evidence on their past grievances, this is to be made to a high standard. The standard is regarded in German legal praxis as a minimum possible standard.[277]

The German court practice supports this conclusion. The Federal Administrative Court has specifically noted that when there must be a full conviction on the claims from where the applicant draws their fear a mere probability is not enough.[278] In particular, a distinction is drawn between the claims on events which have taken place in the host country and claims on events that have taken place outside the borders of Germany. In terms of the latter, the court may not impose unenforceable requirements for proof.[279] Consequently, even if a full proof would normally be required on claims on events within the Federal Republic of Germany, the court must be "satisfied with a degree of certainty that is useful for practical life in truly dubious cases, even if doubts cannot be completely ruled out" when it comes to evidence concerning asylum-based events outside Germany.[280]

The court has noted it is not bound by rigid rules of assessment but makes its decision within the framework of free judicial evaluation (*freie richterliche Beweiswürdigung)* of evidence when deciding which facts it includes or excludes from the overall assessment. The free

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[273] Staffans 2011, p. 139-140.
[274] Staffans 2011, p. 140-141.
[275] Staffans 2011, p 140-141. Staffans refers here to a study by Kokott on use of standards in German case law concerning asylum which has not been available for the present writer.
[276] Staffans 2011, p. 141.
[277] Wolf and Zeibig 2015. p. 25.
[278] *BVerwG. 9 C 109/84* (16.4.1985), para 1: "*Auch in Asylstreitsachen muß das Gericht die volle Überzeugung von der Wahrheit" (Even in asylum litigation, the court must have the full conviction of the truth).*
[279] *VG Würzburg, W 3 K 11.30324* (26.3.2013), para 23. The distinction of events inside and outside the borders has been recognized already in earlier case law. See *BVerwG. 1 C 33/71* (29.11.1977), para 3.
[280] *VG Würzburg, W 3 K 11.30324* (26.3.2013), para 23; also *VG München, M 16 K 14.30763* (15.9.2015), para 20. "*sondern muss sich in tatsächlich zweifelhaften Fällen mit einem für das praktische Leben brauchbaren Grad von Gewissheit begnügen, auch wenn Zweifel*".

evaluation of evidence enables it to cope with the particular circumstances of the individual case.[281] It has thus also departed from using the credibility principles of civil procedure in the asylum context.[282] However, even when applying this framework, the court must gain full conviction (*die volle Überzeugung*) of the truth of the claim of allegation of individual persecution, and not only its probability (*Wahrscheinlichkeit*).[283]

What is required from the applicant in practice is to state coherent facts that are precise in detail and, where appropriate, free from contradictions and inconsistencies.[284] The case is not regarded as sufficiently established if the applicant provides different indications in the course of the proceedings or if their claim contains irresolvable contradictions, if the presentation of reasons for persecution is generally lacking, or if their presentation seems unbelievable in the light of general life experience or due to the corresponding comparable course of events. Also, the case is not regarded as founded if the applicant adds claims in the course of the asylum procedure only very late in the proceedings, in particular if they introduce facts which they regard as decisive for their asylum claim without a reasonable explanation.[285]

The second standard of proof regarding the prognostic future risk assessment is, on the contrary, set low and can be characterised as “substantial probability” (*beachtlichen Wahrscheinlichkeit*).[286] The standard reflects a similar standard as its international refugee law equivalent of “reasonable likelihood”.[287] The Federal Administrative Court has given rather detailed instructions on how this standard is to be applied: a ‘qualifying’ approach must be adopted where all ascertained circumstances and their significance are weighted and balanced. In this approach balancing factors “arguing for persecution have greater weight, and therefore prevail over the facts arguing to the contrary”. The review culminates with an aspect of reasonableness, which is the “primary qualitative criterion” in assessing whether the probability of the persecution is substantial. On a mathematical level this standard can be reached when there is less than a 50% probability that the event will occur. Instead of mathematical calculations, the assessment is more linked to assessment of circumstances. Consequently, the

[281] This aspect is borne within the civil law framework as noted Foster and Sule 2010, p. 141. The principle is thus transported in the administrative framework. As noted by Wolf and Zeibig it is a central principle of general procedural law in Germany, Wolf and Zeibig 2015, p. 20.
[282] See, *VG München, M 16 K 14.30763* (15.9.2015), para 20. In the case these principles have been used in the context of credibility of past events.
[283] *VG München, M 16 K 14.30763* (15.9.2015), para 20.
[284] *VG Würzburg, W 3 K 11.30324* (26.3.2013), para 23; *VG Würzburg, W 4 K 16.31621* (10.02.2017), para 12.
[285] *VG Würzburg, W 4 K 16.31621* (1.0.2.2017), para 13.
[286] *Bayerischer VGH, 11 B 09.30091* (09.08.2010), para 26.
[287] According to Staffans 2011, p. 141.

nature of the feared consequences also play a part in the risk calculations. Thus, the question is also whether a fear is in a proportion for "a reasonable-minded, prudent human being who is considering whether he or she can return to his country" taking into account the risk he or she fears. The particular level of severity of the feared treatment consequently affects the level of mathematical probability of the risk.[288]

The structured approach, i.e. division of the assessment into two separate stages including two divergent standards to which the ground facts are established on the one hand, and the future risk (i.e. the prospective facts) on the other hand, holds a central position in cases where the claims of past persecution have been made. This establishment functions as a detriment for shifting the burden of proof in a process.[289] Recently in cases of past persecution the Court has based its reasoning on the facilitated standard provided in the QD art. 4.4, which has been discussed in the previous section of this study. Consequently, using German national practice of burden shifting in conjunction with Article 4.4 QD, the courts assess the evidential framework differently from those cases where no claims of past persecution have been made or where such claims have not succeeded (i.e. the provided evidence has not reached the standard necessary to convince the court, *"überzeugung",* on the existence of past persecution).

According to the case-law, if the required standard has been met, shifting of the burden of proof takes place. The Federal Administrative Court has noted that if the ground facts have been established the facilitated standard of proof will come to play in a form a refutable presumption of fact:

> The presumption of repetition on which this provision is based is founded in substance on the idea that a repetition of persecution or harm - assuming that the initial situation remains the same - is evident from grounds of fact.[290]

Thus, in practice the past persecution adds weight to past evidential evidence for its repetition.[291] From the perspective of the parties, the consequences of the shift are two-fold. On the one hand, it relieves the victim or the injured party of the need to provide valid reasons for

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[288] See *BVerwG. 10 C 33.07* (07.02.2008), para 37.
[289] In addition to cases concerning past persecution, this method has been used interestingly in the context of group persecution. In this context it has been noted that if political persecution is directed against groups of people who share a common trait, it can be assumed that the persecution is directed against all the members of the group, unless facts disprove the presumption of the rule. Facts which show that the individual member was exempted from the group persecution cannot be provided by the applicant. See *BVerwG. 9 C 599.81* (02.08.1983), para 9.
[290] *BVerwG. 10 C 13.10* (17.11.2011), para 21.
[291] *BVerwG. 10 C 5.09* (27.04.2010), para 23.

realizing the persecution-causing circumstances.[292] It has been noted by the court that the facilitated standard is to benefit the applicant.[293] On the other hand, the burden shift is not conclusive as such. Thus, the overthrow of the burden makes it necessary for the state to refute the born presumption on the repetitive nature of the persecution.[294]

Court practice offers little guidance on a terminological level on the specific standard to be used to measure the facilitated burden of proof related to risk prognosis in cases of past persecution. As a matter of fact, the Federal Administrative Court to the contrary has noted that, based on traditional view (*herkömmlicher Betrachtung*), no sufficient certainty in terms of the reduced probability scale exists and such a standard has thus no significance in refugee determination.[295] However, in the case law before the Qualification Directive became in force, a standard of "sufficiently sure" (*hinreichenden Sicherheit*) has been applied.[296]

The standard for the state to show the persecution will not renew is applied at a high threshold.[297] It has been set in case law that it must be predominantly likely (*überwiegend wahrscheinlich*) that no persecution will occur in the future.[298] A full certainty is not required, but if serious concerns cannot be dispelled the facilitated standard will act in favour of the applicant who must be granted a recognition.[299] The assessment whether the other party can be considered as successful in refuting the presumption of future risk "is to be considered as a judgment in the context of free evaluation of evidence".[300] Making a positive finding of a future risk, the reasoning concerning the prognosis must be based on findings of fact, multiple sources, and be logically comprehensible instead of speculative, and overall adequately stated.[301] According to Marx, a fundamental change in the circumstances in the country of origin is required.[302] Thus, the general level of protection provided by the state of origin that would in normal cases suffice does not suffice in cases of previous persecution.[303]

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[292] *Ibid,* para 23.
[293] *BverwG. 10 C 4.09* (27.4.2010), para 21.
[294] *Ibid,* para 23.
[295] *BVerwG. 10 C 5.09* (27.04.2010), para 23.
[296] *Bayerischer VGH, 11 B 09.30091* (9.8.2010), para 27. This standard is no longer applicable, and has been replaced by the requirements of Article 4.4 QD.
[297] In *BVerwG. 10 C 33.07* (07.02.2008) the court requires that high standards to be met for the probability that renewed persecution can be excluded. *See BVerwG. 10 C 33.07* (07.02.2008), para 38.
[298] *VGH Baden-Württemberg, A 5 S 1251/06* (11.12.2008), para 46.
[299] *VGH Baden-Württemberg, A 5 S 1251/06* (11.12.2008), para 46; *BVerwG. 10 C 33.07* (07.02.2008), para 38.
[300] *BVerwG. 10 C 5.09* (27.04.2010), para 23.
[301] *BVerwG. 10 C 21.08* (5.5.2009), para 20.
[302] Marx notes similarly that based on the interplay between the case history of Germany and the QD Art.4.4, the changes in the country of origin must be reasoned to a very high standard able to convince the authority on the reasonableness of the return. See Marx 2007, pp. 1120-1122.
[303] *Ibid*, p. 1121, para 238.

It is unquestionable that the entry into force of the Qualification Directive at the EU level has impacted on the German national practice. As examined in the previous section, article 4.4 QD stipulates that previous harm or direct threats of persecution are a serious indication of future harm unless there are good reasons to consider that such harm will not be repeated. The article is repeatedly referred to in German court practice as a source of law in cases where previous persecution has been established by a lower instance court, but a need for re-evaluation of future risk is under assessment. It is interesting however that the shift in the burden of proof was already a well-established practice in German asylum appellate courts before negotiations on Common European Asylum System was launched. The Federal Administrative Court had already in 1980 noted the repetitive nature of past persecution and formed an obligation for the state to reassure in the assessment that such a risk will be excluded in a sufficient manner.[304]

Because the Article 4.4 requirements can be interpreted to include shifted burden of proof in a similar manner as used in German case-law history and tradition, Staffans argues that the mechanism in the QD has been lifted from German practice to the EU level. [305] This can indeed be so. Nevertheless, the German courts have also had to adjust their previous practice to the requirements stemming from the QD.[306] According to previous practice persons who were persecuted in one part of their home country but could have found protection in another part of the home country at the time of emigration were not considered to be previously persecuted. Consequently, as no previous persecution in such cases existed, the normal prognostic standard of "reasonable probability" was considered applicable. Recently the German courts have ruled this interpretation to be incompatible with the requirements of QD Art. 4.4.[307] Also, it has noted that the facilitated standard of proof of "sufficiently sure" in cases of past persecution is no longer applicable.[308]

It has been clearly established in the practice of the German courts that the applicant can benefit from the facilitated standard of proof also in cases of subsidiary protection.[309] In such circumstances the court has found a reason to assume a risk of a significant individual threat occurring even if the level of indiscriminate violence in a situation of armed conflict is not

[304] *BverfG. 54* (2.7.1980), para. 52.
[305] Staffans 2011 p. 62 and 131.
[306] *Ibid.*
[307] *BVerwG. 10 C 52.07* (19.1.2009), para 29; *BVerwG. 10 C 21.08* (5.5.2009), para 19. This does not however mean a refusal of recognition could not be based on internal flight alternative at the time of decision making if it exists as it existed at the time of emigration, as noted in the *BVerwG. 10 C 52.07* (19.1.2009), para 19.
[308] *Bayerischer VGH, 11 B 09.30091* (09.08.2010), para 27.
[309] *BVerwG. 10 C 13.10* (17.11.2011), para 21; *BVerwG. 10 C 5.09* (27.04.2010), para 23; *BVerwG. 10 C 4.09* (27.4.2010), para 27.

extremely high.[310] However, the applicant does not benefit from the facilitated standard of proof in these cases without an internal nexus between the harm previously suffered or threatened with and the harm he or she is threatened with at present.[311] The nexus requirement applies in all of the cases where Article 4.4 of the QD comes into play.[312]

The shift in the burden has been justified because of the humanitarian nature of the asylum and the mostly serious and lasting consequences of the once suffered persecution. The humanitarian nature prohibits this way further burdening such a person.[313] Thus, the court has noted that the nature and extent of previous persecution should be taken into account in deciding the reasonableness of a return.[314]

To conclude, the long tradition of conceptual and structural use of evidential principles is perceivable in German asylum cases concerning past persecution. This is not surprising in the German context which in general has been for a long time known for its logical, abstract and systematic method in applying legal principles.[315] Both parties in the process hold explicit duties and the court carries an inquisitorial role in "finding the truth" in the case, also by employing special evidential practices in establishing the factual basis of the case. The standards of proof in both stages of the assessment have developed in line with the German legal tradition where civil law principles have also had a role to play. Consequently, in establishing the factual basis of the case no lower standard is regarded as suitable than the one resembling the civil law standard, which is generally accepted as lowest possible standard. The high standard in the first stage of the procedure is however balanced with a low standard in the second stage.

The clearly divided two-stage structure is a central feature in cases concerning past persecution because it serves as a detriment to shifting the burden of proof from the applicant to the state to give reasons as to how the risk of the repetitive nature of persecution has been eliminated. The standard for a finding of a future risk is considerably lower and arguing against the borne presumption requires substantial reasons which ought to be assessed with a high standard of

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[310] *BVerwG. 10 C 4.09* (27.4.2010), para 30.
[311] *BVerwG. 10 C 13.10* (17.11.2011), para 21; *BVerwG. 10 C 4.09* (27.4.2010), para 30.
[312] *BVerwG. 10 C 4.09* (27.4.2010), para 31; See more detailed reasoning on this in the case *Bayerischer VGH, 11 B 09.30091* (9.8.2010), paras 40-41.
[313] *VGH Baden-Württemberg, A 5 S 1251/06* (11.12.2008), para 46; *BVerwG. 10 C 21.08* (5.5.2009), para 25.
[314] *BverfG 54* (2.7.1980), para 50.
[315] See on the key features in the German legal tradition influenced by the Pandectists movement with a primary aim of a dogmatic study of Roman material, DeCruz 2007, p. 27-28; 82-84 and 97-98.

proof. The practice of shifting the burden of proof in cases of past persecution is nothing new in the German tradition, but has been a well-established court practice for more than 35 years. Even so, the practice has adapted to the European asylum law requisites that also generally speaking have influenced a great deal the German practice in matters of international protection.

4.2. United Kingdom

4.2.1 Main Features of National Asylum Law and Procedure in the United Kingdom

Asylum matters gained considerable attention in the political agenda in the United Kingdom in the beginning of the 1990s due to a rise in the numbers of asylum seekers, the beginning of the harmonization process of the EU, and the introduction of new policies in Europe for refugee protection.[316] The Refugee Convention, which was ratified by the UK in 1954, was incorporated only during this "new era" into the immigration laws, in 1993.[317] Before these developments asylum matters in the UK were regulated under the Immigration Rules,[318] which still today stand as one of the most important pieces of legislation containing an extensive compilation of the UK's immigration law.[319] The compilation consequently formed and still forms "a practice to be followed in its administration when regulating the entry into and stay in the United Kingdom" as described in the Immigration Act 1971.[320]

Consequently, the Immigration Rules used to be the primary source for all courts in the UK in asylum matters.[321] However, as distinct from other European countries, the legal system in the UK is based on the common law tradition where the role of the judiciary is dominant. The case-based system of law functioning through analogical reasoning, and improvisatory and pragmatic legal style, are recognizable also in asylum cases.[322] Thus, as Staffans describes, the legal asylum environment in the UK has been similarly law-making and interpretative[323].

When approached from the perspective of the sources of law, the written law nevertheless also holds an important role in English common law tradition.[324] Similarly, in RDP the substantive acts and rules on immigration, rules on the appeal procedure[325] and a collection of legally non-binding policy guidance for decision-makers[326] provide an important normative guidance for

[316] Harvey 1997, pp. 60-63.
[317] Lambert and Husain 2010, p. 127.
[318] Home Office, Immigration Rules, Published 25 February 2016, Updated 28 August 2018.
[319] Lambert and Husain 2010, p. 127.
[320] Immigration Act 1971, Section 3(2).
[321] Lambert and Husain 2010, p. 127.
[322] On key features of the English Common Law Tradition, see De Cruz 2007, pp. 103-108.
[323] Staffans 2011, p. 188.
[324] Legislation has become an authoritative source of law in recent times and can become sometimes the primary source of law when no cases on the matter exist or are of no relevance to the issue in question. However in conflict with a judicial decision, the statute will prevail. DeCruz 2007, pp. 104-105.
[325] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (hereafter, the Procedure Rules *(FTT) (IAC)*; The Tribunal Procedure (Upper Tribunal) Rules 2008, hereafter, the Procedure Rules *(UT)*.
[326] So called Asylum Policy Instructions (API).

the process. Part 11 of the Immigration Rules contain procedures and criteria to apply to applications for asylum, which nowadays are considered in accordance with the 1951 Convention and the 2004 Qualification Directive to which the United Kingdom has opted in.[327] The claims on asylum are thus considered in accordance with these legal sources, with the Refugee Convention holding a central position in the assessment.[328]

The common law doctrine of precedents does not apply in a strict sense in asylum cases.[329] However, certain decisions carry a role as such: the decisions of a panel of the Upper Tribunal's Immigration and Asylum Chamber (hereafter *UT IAC*) concerning questions where there is "diverging jurisprudence on an important question of law", i.e. so called "starred determinations", become binding as a matter of law.[330] In addition, so called "country guidance determinations" carry a special weight as decisions containing an authoritative finding on the country guidance on the issue in question.[331] The failure to follow such a determination is regarded as a breach of a principle of legal certainty and can consequently be a ground of appeal of a point of law.[332] Furthermore, the First-Tier Tribunal (hereafter, *FTT*) is generally expected to follow the decision of the higher instance if it is not convinced on a failure in the application of a legislative provision or previous binding precedent.[333]

Since the beginning of the 1990s, the UK asylum system has been in a constant motion.. The compilation of the Immigration Rules is regularly updated.[334] Moreover, the appeal procedure system has gone through various institutional and structural reforms in order to answer the challenges of the increasing amount of applications in a dynamic way.[335] The institutional

[327] According to paragraph 343 of the Immigration Rules a status will be granted if it has been satisfied that the person in question is a refugee in the meaning of a UK regulation which implements the 2004 Qualification Directive (paragraph 343(ii)) or if refusing the application would result in a breach of the Refugee Convention (paragraph 343 (v.). The paragraph also includes exclusion clauses on the basis of crimes or posing a danger to the security of community of the United Kingdom (343(iii and IV). See Home Office, Immigration Rules, and The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, explanatory note.

[328] According the Immigration Rules paragraph 382 asylum claims will be determined by the Secretary of State in accordance with the Refugee Convention.

[329] Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011, No. 2, para 10.

[330] *Ibid.*

[331] Practice Directions of the IAC of the FTT and the UT, paras 12.2 and 12.4.

[332] Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011, No. 2, para 10.

[333] *Ibid.*

[334] The frequency in updating the rules is noticeable from the amount of public policy papers where the changes to the rules can be found. See the Home Office collection on the Statement of Changes which is openly available on Home Office website.

[335] See on the reforms concerning appellate procedure a summary from the beginning of the asylum appeal procedure 1969 until structural changes in the Court composition in 2010, Staffans 2012, pp. 180-183. Most recent changes in the procedure since have taken place as a result of implementation of the Immigration Act in 2014 introducing a new framework for an appeal in immigration matters by reducing a number of appealable immigration rights from 17 to 4. Matters concerning asylum fall under the concept of "protection claims", and

structure of the appeal procedure as it stands today is as follows: the asylum applications are decided by the UK Visas and Immigration Department (*UKVI*) functioning within the UK Home Office. The decision can be appealed to the First-Tier Tribunal (*FTT*), a part of a unified tribunal framework (established by the Tribunals, Courts and Enforcement Act 2007) in the Ministry of Justice, where the case is reviewed on its merits by the Immigration and Asylum Chamber (hereafter *FTT IAC*). The decision of the *FTT IAC* can be further appealed (by permission either by *FTT* or *UT*[336]) to the Upper Tribunal (hereafter, *UT*) regarding the questions of law.[337] In very exceptional cases, where the case is not further appealable, a judicial review can be requested from the High Court which reviews only the legality and fairness of the decision.[338] The courts of general jurisdiction come into play only after the First Tier Tribunal process and only with a permission (in case of the Court of Appeal) or with a certification (in case of the Supreme Court[339]). These appeal procedures review only questions of law. In the case of the Supreme Court (before, the House of Lords) as the highest instance the case at hand must also include points of law of public importance. Holding an oral hearing is a primary norm when reviewing the case before the appellate tribunals.[340]

4.2.2. Evidential Standards and Past Persecution in UK Asylum Practice

The written body of law in the UK gives only a general framework to the questions of evidence but does not contain specified rules on allocation of burden of proof or standard of proof. In contrast, the earlier version of the rules used to explicitly place the burden of proof on the

consequently form a ground of appeal as previously. See more on the right to appeal and protection claims, Home Office: Rights of appeal, Guidance, 30 July 2018. The new Immigration Act 2016 further limited the appeal rights in immigration matters generally, but the changes do not apply in cases of international protection.

[336] See the Procedure (UT) Rules 2008, Rule 22 and the Procedure (FTT) (IAC) Rules 2014, Rule 33. After this there is no possibility for an appeal but a permission to apply for a judicial review in High Court on certain limited grounds according to Rule 54.7A Civil Procedure Rules.

[337] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, Rule 33 on application of for permission to appeal to the Upper Tribunal read together with Rule 35 “Review of a decision” containing in its paragraph 1b the requirement for the “error in law”. The two-tier system was created by the Tribunals, Courts and Enforcement Act 2007, and the applicable procedural rules were amended in 2014. The system is now composed of the First-tier Tribunal and the Upper Tribunal, which both contain several chambers dealing with differing administrative issues. One of the aims of the amendments was to remove an appearance of unfairness in the previous procedural structure to which Staffans also refers in her study. See explanatory memorandum to the tribunal procedure rules 2014, part 7.10 and Staffans 2011, p. 185-186.

[338] As governed by the Supreme Court Act 1981 and Rule 54 Civil Procedure Rules (CPR). Lambert and Husain 2010, p. 130.

[339] Authors note: In October 2009 judicial authority was transferred to the Supreme Court away from the Appellate Committee of the House of Lords.

[340] In proceeding of the FT IAC, holding a hearing is considered as an obligation to which certain limited exceptions can be made. The rules of a procedure however contain a wide discretion on the exceptions as the Court can also make a decision without a hearing if it can “justly determine the matter” without it. See rule 25. The rules regarding procedure of the UT however contain no exceptions. See rule 34.3.

applicant.[341] Nevertheless, it has been firmly established, and also reaffirmed in the recent practice of the UK courts, that the burden of proof in asylum cases is on the appellant[342].

Moreover, even if the UK asylum appellate system has distanced itself from some of the ’purest’ principles of common law tradition such as the binding force of precedents, the burden of proof is nevertheless in practice affected by them. This is because the two-party principle in adversarial proceedings, a typical feature in common law systems, stresses the responsibility of the parties in the production of evidence.[343] As the tribunal does not participate to the fact finding but instead heavily relies on the material produced by the parties, the burden of proof of the appellant is in practice significant. It is consequently of central importance for the final outcome that the appellant is capable of providing the material and presenting the claims to support his or her claim.

In order to balance the differences in power and guarantee an effective right of access to the tribunal, a requirement for “the highest standards of procedural fairness” in making asylum decisions has been noted in UK asylum practice.[344] The aim of a fair procedure is achieved in UK practice through a tribunal’s broad powers to give direction on evidence or submissions with due regard to the objectives of the rules of procedure.[345] In its recent decision *AM (Afghanistan)* concerning “fair determination of claims for asylum from persons whose ability to participate effectively in proceedings may be limited”, the Court of Appeal elaborated these objectives in length, also from the point of view of common law duty of fairness.[346] These principles were developed as guidance of the general approach to the application of principles in claims of asylum of “children, young people and other incapacitated or vulnerable persons”,[347] thus, distinguishing this category of applicants as a separate group from the asylum applicants generally. Nevertheless, the imbalance in power relations as part of the procedure concern to a certain extent all of the applicants, as in most cases the applicants do not hold a similar level of knowledge of the procedure or resources in country situation research, argumentation skills, or capabilities to use such skills in an unknown atmosphere where the

[341] The rules of procedure 2005 placed in clear terms the burden of proof on the appellant by stating “it is for the appellant to prove that the fact asserted is true” (Rule 53).
[342] See for instance *AS (Safety of Kabul) Afghanistan* CG [2018] UKUT 00118 (IAC) where the burden of proof is specifically addressed in paras 41-44, also *Fadil Dyli*, para 21.
[343] Staffans 2011, pp. 189-190.
[344] *AM (Afghanistan),* (2017, Court of Appeal), paras 21 and 22.
[345] The Procedure (UT) Rules 2008, Rule 15 and The Procedure (FTT) (IAC) Rules 2014, Rule 2 and 14, as well as their application in the case of *AM (Afghanistan)* (2017, Court of Appeal), paras 24-26.
[346] See *AM (Afghanistan)* (2017, Court of Appeal), para 39.
[347] Ibid, para 1.

procedure takes place, at least when compared to the asylum professionals in the Home Office. Thus, in UK court practice the standard of proof has been used as a key tool to even out the differences in power linked to the two-party setting.[348]

The applicable standard of proof in asylum cases in UK court practice is "reasonable degree of likelihood", a threshold also referred to as the *Sivakumaran* standard named after the case in which the standard was originally established nearly 30 years ago.[349] It becomes evident from *Sivakumaran* that differing semantics as "reasonable chance", "substantial grounds for thinking" or "serious possibility" all refer to the same standard, nor is the standard used in human rights claims based on ECtHR rulings of a real risk any different from it.[350] What is also well-established is that the *Sivakumaran* standard is a low standard, significantly lower than the "balance of probabilities" generally used in civil law matters, hence the "more likely than not" test is not applicable. However, terminology such as "possible" or "perfectly plausible" on the other hand place the likelihood of risk too low.[351]

Past persecution alone does not by itself suffice to be granted asylum in UK, and instead the assessor must take into account everything that is told to them and make their own value judgment of what occurs in light of the past and the present.[352] In the case of *Adan* the Lord Lloyd of Berwick carefully elaborated the issue of past and present fear as contained in the concept of well-founded fear in the Refugee Convention.[353] Ever since it has been clearly established that it is the current fear of persecution in the future that is decisive, while historic fear may provide evidence to establish present fear. The Immigration Rules contain the same notion in paragraph 339K, according to which "the fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of

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[348] According to Staffans the practical significance of the standard of proof as a tool to even out evidential power imbalances holds a central position in UK practice, which is reluctant to provide procedural relief through any reduction of burden of proof itself. See Staffans 2011, p. 195 and pp. 204-205.

[349] This standard was brought up by Lord Justice Keith in *Sivakumaran* (1987, House of Lords), where Lord Justice Templeman referred to "a real and substantial danger" and Lord Justice Goff to "a real and substantial risk", which however all resemble "equivalent expressions" as noted in *Hovarth*. See the elaboration in *Hovarth* (2000, House of Lords) by Lord Justice Clyde.

[350] See *Sivakumaran* (1987, House of Lords) where Lord Justice Keith relies on Lord Justice Diplock; also *Kacaj* (2001, starred), para 12 and 15.

[351] *PD* v. SSHD, Sri Lanka [2008] UKAIT 00058, 28.5.2008, para 41.

[352] R v. SSHD, Ex parte *Halil Direk*, (1992, High Court), where the application is dismissed by holding that when "a person has been persecuted in the past and even if there had been a measure of ill-treatment thereafter, it did not follow he could never be refused asylum in a country to which he went."

[353] See Lord Justice Lloyd of Berwick in R v. SSHD, Ex parte *Adan*. (1998, House of Lords).

suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated", which repeats the exact wording of the EU QD Art. 4.4.

The evidential value of past persecutory acts has been analysed by Lord Justice Stuart-Smith in *Demirkaya*, regarded as "a leading case on past persecution".[354] In light of *Adan* and by relying on academic writings of MacDonald and Hathaway, Lord Justice Stuart-Smith elaborates it to be "common sense" that past persecutory acts serve as supporting evidence if there has not been a significant change in a country.[355] If it is thus a view of a tribunal that such a significant change has taken place, "it is incumbent upon them to explain why this is so".[356]

It is notable that in this case Lord Justice Stuart-Smith also elaborated on the correct application of burden of proof in brief.[357] By emphasizing the low standard of proof already recognized in case law, the Lord Justice noted that a correct question of the previous court to ask was whether *there is a real risk* that the applicant *will not* be released from detention after arrival to his county which would thus lead to persecution, and not whether it is "*reasonably likely*" that he *will* be released". Thus, even if it is up to the tribunal to reason the changes in the country situation that no persecution in the future exists, it must base its conclusions on whether the evidence before it reaches the standard of "a reasonable likelihood" of future risk.

Consequently, it could be argued that the burden of proof was held on the applicant also in cases of past persecution and the standard used in the context of future risk remains the same low standard as previously. When drawing from the practice of the tribunals it is the obligation of the tribunal in such cases to point out and reason clearly which are the changed circumstances why the persecution would not renew. It also becomes clear that the change of circumstances does not necessarily need to be a change in the country situation *per se*, but a material change in conditions relevant to the applicant's fears. The change can consequently concern for instance a pattern of crime in the country of origin where the applicant is targeted or insufficiency of protection by the state from criminal acts. For instance, in the case concerning trafficked women from Thailand, the *UT* notes that the situation concerning the level of state protection in Thailand has not changed, and therefore the lack of support, lack of economic opportunity, the stigma attached to the applicant as "a prostitute" and her vulnerable state of

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[354] *Demirkaya* v. SSHD, (1999, Court of Appeal). The case has been regarded as a leading case in *AZ (Trafficked women) Thailand CG*, see para 154.
[355] *Demirkaya* v. SSHD, (1999, Court of Appeal), part "Tribunal's Failure to Have Regard to Previous Persecution.
[356] Ibid.
[357] Ibid, part "Burden of proof".

mind would contribute to the risk of being re-trafficked.[358] Similar reasoning stands in *SA* where the *UT* regarded that the *FTT* had insufficiently assessed in the light of past persecution that the actors of persecution in the said case would no longer target the applicant, and when they did target him, whether the local police would alter their past pattern of siding with perpetrators.[359] Also, this type of approach is endorsed when the *FT* has failed to reason "a material change of circumstance" when persecutory acts have not been even committed, but previous direct threats of such acts have been regarded as real and likely to be carried out.[360]

In UK practice the past persecution does not move evidential responsibility towards the state in terms of burden of proof, as addressed in *Fadil Dyli,* where the representative of the applicant suggested this type of shift in light of the previous judgement of *Arif.* [361] The Tribunal's response was to distinguish the case of *Fadil Dyli* from *Arif,* regarding the latter as "a particular kind", because in *Arif* it had been accepted by both sides that the applicant was entitled to a refugee status (even if he had not yet been granted one) before changes in circumstances in his home country.[362] The court consequently rejected the applicability of reversed burden and limited its use only to cases where it has been accepted that the claimant was in the past entitled to refugee status. Moreover, the ruling also makes clear that the reverse of the burden even in such circumstances concerns only evidential burden and can be adduced by "pointing to evidence showing a change of circumstances relevant to the claimants claim", thus it does not include any duties in production of evidence *per se.*[363] Consequently, in cases where the starting point is that the appellant needs to establish that he or she is a refugee the burden of proof lies on him or her despite the applicant's past experiences.[364]

This result was endorsed again in *GH* where the representative of the appellant argued that the ratio in *Arif* was applicable since the past torture and persecution of itself demonstrated entitlement to recognition as a refugee.[365] In addition, it was suggested that the standard of the SSHD to show a change in the country of origin should be placed on the level of "balance of

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[358] *AZ (Trafficked women) Thailand CG [2010]* UKUT 118 (IAC), 26 January 2010, para 41.
[359] *SA* v. SSHD [2011] UKUT 30 (IAC), paras 10 and 17.
[360] *R S* Anonymity Direction Made v. SSHD, UT (IAC) 12th July 2017, paras 15-16.
[361] *Fadil Tydil* v. the SSHD. CG [2000] UKIAT 00001 (IAT), para 3. In *Arif*, (*Mohammed Arif* v. the SSHD [1999] Imm AR 271) Lord Justice Simon Brown had placed the burden on the Secretary of State by analogy to a cessation of a refugee status to establish that this appellant could safely be returned home.
[362] *Fadil Tydil* v. SSHD, CG [2000] UKIAT 00001 (IAT) (30.08.2000), paras 24-26.
[363] *Ibid.*, paras 28 and 30.
[364] *Ibid.*,, para 26.
[365] *GH* Iraq CG [2004] UKIAT 00248, paras 22-25.

probabilities" as a result of the shift.[366] By repeating the particular features in the case of *Arif*, the Tribunal endorsed its previous view and noted its surprise that it needed to do so in the first place.

The reluctance of the UK courts to use shifted burdens is evident also in other case contexts where it has been suggested to be applied. For instance, in cases of internal relocation alternative the tribunal rejected the view that the respondent would bear the burden of proving that there is a part of the country of nationality of an appellant to which he or she could reasonably be expected to go and live, because even if the respondent will point to evidence on the general conditions of the area of relocation, it is nevertheless "for the appellant to make good an assertion that, notwithstanding those conditions, it would not be reasonable to relocate there". This is because the SSHD cannot be expected to lead evidence on issues which depend on reasons about which only the appellant could know.[367] Consequently "the issue of relocation needs to be put 'in play' between the parties".[368] In the context of practicality of removal itself the Tribunal also has in a strict manner ruled out the possibility of shifting burdens by noting it to be a "considerable disadvantage to the workings of an already overburdened Tribunal system by a concentration for evidential procedural reasons on issues which are not germane to the issue of which the Tribunal is seized – namely current risk on hypothetical removal."[369] Also, the Court has limited the use of shifted burdens to show whether a document produced by an applicant is a forgery.[370]

All in all, the reversed burden of proof is in a very limited usage as an evidentiary method in UK asylum practice. Instead the procedural help for the applicant is provided by other means, namely through application of a low standard of proof. The low standard of proof is not relevant in the UK context only in respect of future risk, but also in the context of establishing past facts, an approach which has produced highly interesting case law material on the method to be used in the evidentiary assessment of asylum cases. A central feature in this discussion has been whether the approach for the assessment should be a unitary one or based upon a two-branch test, i.e. whether establishing the ground facts on the past is a separate stage from that of the establishing the future risk to which a different standard of proof – the standard of probabilities

[366] *Ibid.*
[367] *AMM and others* (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC), para 225.
[368] *Ibid*, para 227.
[369] *GH*, Iraq CG [2004] UKIAT 00248, para 25.
[370] See *Tanveer Ahmed*, [2002] UKIAT00439 (IAT) Starred, para 38.

– should be applied. The discussion has included opinions for and against, and ended in a split decision in *Kaja*, where the majority stressed the need for a holistic approach.[371] The majority based its opinions on the view that the uncertainties are meaningful for the final assessment of the case and excluding them would make "a serious inroad into the focus on the risk or reasonable degree of likelihood which lies at the heart of *Sivakumaran*".[372] Moreover, the majority continued, this type of method would lead to an unnecessary complexity as the obligation to establish facts "more likely than not" must work also for the evidence presented by the State. The minority on the other hand pointed out that since in asylum cases the oral testimony of the applicant is of paramount importance as evidence on the past facts, and since there is no reason that telling the truth "should be no more difficult in an asylum appeal than in any other type of appeal", the same standard as in civil cases in general should apply.[373]

The question of the proper standard in respect of past facts was challenged and settled eventually by a strikingly thorough analysis in *Karanakaran*, where the Lord Justice Brooke, by relying on the approach of Australian Courts, elaborated in great detail a proper approach to evidence in asylum cases. In his analysis all the elements of the case are assessed as a whole: He notes:

> When assessing future risk decision-makers may have to take into account a whole bundle of disparate pieces of evidence:
>
> (1) evidence they are certain about;
>
> (2) evidence they think is probably true;
>
> (3) evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true;
>
> (4) evidence to which they are not willing to attach any credence at all.
>
> The effect of *Kaja* is that the decision-maker is not bound to exclude category (3) evidence as he/she would be if deciding issues that arise in civil litigation.[374]

The views of the majority in *Kaja* were thus upheld by emphasizing asylum cases as "questions not of hard fact but of evaluation of evidence", where pieces of evidence are given differing

[371] *Kaja* [1994] UKIAT 11038, paras 25-29.
[372] *Ibid*., paras 33-34.
[373] *Ibid*., paras 37-41.
[374] Lord Justice Brooke in *Karanakaran* (Court of Appeal, 2000).

weights but where giving lesser weight to certain facts over others is not equivalent to rejection of those claims.[375]

To conclude, the evidential method in UK asylum cases is centralised around standard of proof and the powers of the Tribunal to approach evidence in flexible manner. Even if the burden of proof is placed on the applicant in cases of past persecution in a similar manner as in cases where such indication has not arisen, the overall procedural fairness is provided through a low standard of proof and weight that is attached to past persecution as a factor of evidence. The low standard of proof does not in practice mean more ready acceptance of past persecution as "more likely than not to have occurred, but (holds) a more positive role for uncertainty" in light of *Kaja*.[376] On the contrary, an absence of past persecution can also be regarded as a factor which diminishes the likelihood of future risk if there has not been deterioration in the circumstances in a country, or other special factors.[377]

Nevertheless, the past persecution also is of relevance when assessing the past events in general because it can in certain cases affect the capability of the applicant to present claims. With analogy to case of *AS,* the court can in some particular cases of past persecution bear an obligation to give precedence and greater weight to objective evidence and indicators of risk rather than personal credibility depending on the possible vulnerability of the applicant.[378] In addition, the past persecution has special weight as a cumulative ground in the assessment of whether the persecution in the future would be regarded as sufficient enough to amount to persecution, as Baroness Hale of Richmond eloquently considered in her gender-sensitive reasoning in the case of *Hoxha* concerning so called "continuing effects" of severe past persecution.[379] Due to similar reasoning, the past persecution carries also an evidential weight when assessing whether the applicant would face "undue hardship" in cases concerning reasonableness of internal relocation alternative[380].

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[375] Lord Justice Sedley in *Karanakaran* (Court of Appeal, 2000).
[376] *Kaja* [1994] UKIAT 11038, para 27.
[377] In the case of *B* the Tribunal notes that even if past persecution is not determinative for a future risk it is difficult for the applicant to establish that he would be targeted by the authorities without past ill-treatment, and continues, pointing out that "persons who have associations with HADEP may find themselves in difficulty. However, the finding of no past persecution makes this submission of little value". *B* v. SSHD [2006] EWCA civ. 1267, 13.7.2006 paras 22-23.
[378] *AM (Afghanistan),* (2017, Court of Appeal), para 22.
[379] As noted by the Baroness Hale: "Of course the treatment feared has to be sufficiently severe, but the severity of its impact upon the individual is increased by the effects of the past persecution." para 36. See the full reasoning paras 27-39 in In re B (FC) (Appellant) Regina v. Special Adjudicator (Respondent) ex parte *Hoxha* (FC) (Appellant), (2005 House of Lords).
[380] *MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC),* para 13; also *SSHD (Appellant) v. AH (Sudan) and others (FC) (Respondents),* (2007, House of Lords).

4.3 Drawing Comparatives: Different Approaches to the Same Issue

While the essence of the burden of proof in cases concerning past persecution is regarded in a similar manner in the national practice of the United Kingdom and Germany, the evidential standards and methods used evidently differ. In both national practices the burden of proof to claim on the factual basis of past events, and that of past ill-treatment, is placed on the applicant. This, however, is not so when establishing the future risk. Nevertheless, when regarded only in terms of the initial burden of proof, this is placed on the applicant in both procedures. In UK court practice, which has (to a certain extent) an authoritative standing when it comes to sources of law, the applicant's burden of proof has been established in explicit terms, whereas in the German practice the Residence Act could in theory provides also an alternative reading because of its formulation as a general deportation ban.[381] Nevertheless, the transposition of the European Union Qualification Directive into the German Asylum Act has had an impact on formulating the evidential duties of the parties thereof.

Regarding the assessment as a whole, it is clear that the procedural background has clear implications to the content and extent of the burden of proof. Even if the appellate asylum procedure in United Kingdom has distanced itself from some of the purest principles of adversarial proceedings, the applicant's burden of proof is emphasised due to the procedure when contrasted to the German inquisitorial system. This flows from a two-party setting where the production and presentation of claims and evidence lies on the parties, while the judge distances themselves as a passive arbitrator, whereas in the German system the court also carries out investigatory tasks in collecting information that is also used as a central source of information in the proceedings. The engaging of the German court into the investigation of the asylum case, also in terms of special fact-finding mechanisms of its own, as well as its shared duty based normative guidance for the process, entails that the burden of the appellant is in practice more relaxed. Even if the level of engagement by the Court can in practice be limited due lack of fact finding capacities or aiming for quicker and more efficient handling of the cases, the system clearly emphasises the duties of the state party in a process functioning *with* the applicant. When contrasted with the system in the United Kingdom, where in practice the applicant also bears burden to produce country of origin information that supports his or her

[381] The deportation ban in German law is formulated around the principle of *non-refoulement.* As exemplified by Popovic, when asylum procedures are designed for the grant of *non-refoulement*, a starting point to the decision changes and it is the host country who carries an onus to prove the legality of its actions. In such a procedure the truth value of the hypothesis of victimization in the past is investigated by using the applicant as an informant providing evidence among other forms of evidence. See the article by Popovic 2005, pp. 27-53.

standing, the power imbalance between the parties in order to base claims consequently differs from the outset. In sum, in both procedures it is the appellant who is required to claim that the past ill-treatment has occurred.

Nonetheless, in terms of a final result in a case, the consequences of the higher demands in terms of the burden of proof in the UK procedure are smoothened by a low standard of proof in asylum adjudication. On the basis of comparison of standards of proof, it must be underlined in this context that the evidential method employed by the system also has a role to play here. While the method applied by the UK appellate bodies is a holistic one, the German court practice tends to approach the assessment in a two-stage manner. Consequently, in the national practice of the UK the standard of proof to establish the ground facts on past persecution is seemingly lower than in German practice. This at least partly flows from the UK method which includes taking all facts into the final assessment of the future risk 'in round'. As can be noted in the practice of the tribunals, only such ground claims that are excluded from the final equation are the ones which 'do not hold any credence'. The ground facts then, as a whole, are contrasted to a standard of 'reasonable likelihood' of the future risk, a standard which, due to its prognostic nature, is correspondingly low.

In the German system the assessment includes two separate stages. It is noteworthy that a similar method has been discussed also in the UK asylum court history on more than one occasion, but was finally regarded incompatible in the UK context. The two-stage assessment in Germany hence also includes two separate standards of proof, one in order to establish ground facts, and another one in assessing the future probability of a risk. The differing perspectives on standard of proof potentially also links to the legal tradition of the comparative countries. Where standard of proof and burden of proof have a long tradition in the common law system, their appearance in the civil law system has slightly differed by nature. It has been observed that the standard of proof in civil law countries is principally not "probalistic" but what is central is the level of conviction of the judge on the matter.[382] That being so, the law centralizes on the impression that the evidence has been able to produce in the mind of the judge and whether such an impression convinces the judge about the fact. The key figure in such an assessment is a judicial intuition which brings subjectivity into the assessment in addition to objective evidence.[383] The case-law narrative of the German Courts supports this view. The standard of proof in asylum cases is distanced from "beyond reasonable doubt" requiring full

[382] Engel 2009, pp. 440-442.
[383] Ibid.

conviction, but the judge needs nonetheless to be convinced on the applicability of the norms. Thus, through free judicial evaluation of evidence concerning the facts – a cornerstone feature in civil law assessment – all of the doubts are not completely ruled out, the judge needs to be convinced on the past ill-treatment in light of, among other factors, “general life experience”.[384] A similar narrative is employed also in the context of standard of proof concerning future risk, where the judge needs to question whether the fear of the applicant seems ‘reasonable’ in given circumstances.

It is worth noting here that due to the approach of the German system the credibility of the applicant becomes emphasised as part of the applicant’s burden of proof. This follows from the duties to prove claims on which evidence is easiest to attain, which in cases of past persecution centralize around oral evidence. It has been clearly noted in the practice of the court that the applicant is regarded as a witness in his own right. In the UK system the applicant also bears evidential weight in terms of background evidence on his or her individual experiences, such as country of origin information that confirms a heightened level of risk to some specific persons, unavailability of protection in the home country against such risk, additional materials of belonging to a risk group in a first place, as well other key factors. The low standard of proof provides means for ‘equality of arms’ in the process. Also, the adversarial nature of the proceedings does not mean that the UK courts would remain entirely passive when faced with apparent asymmetries in evidential power, but take part in the assessment through cross-examination and by leading the process. In addition, the highest instance carrying procedural quality control, i.e. the Court of Appeal, has explicitly brought into play a common law duty of fairness in asylum claims, recognizing some procedural vulnerabilities which lower the burden of proof, including requirements in terms of evidence. Such recognition of procedural vulnerabilities can be highly significant in cases of past persecution.

To summarise the above, a similar standard as a civil law standard is therefore used in German asylum cases in the first stage of the procedure concerning past facts, whereas in the UK the standard is seemingly lower. In the German system, ground facts which do not exceed the first standard can be ruled out from the final assessment, whereas in UK practice a mix of ground facts also with lower evidential value are included and assessed together. The main differences of approach in cases concerning past persecution in the practice of the states under comparison becomes most evident when explored as an indication of a future risk. Without a doubt the

[384] See section 4.1.2 of this thesis.

jurisprudence of both countries puts evidential weight on the past persecution in their practice, as required by the EU and the ECHR framework on the matter. In cases where it has been sufficiently proved that the appellant has been victimized to persecution before applying for asylum, a change in circumstances of the case must have occurred in order to consider returning the asylum seeker to the country of origin. In UK practice there must be a material change in circumstances in order for deportation to come into consideration. In the practice of the court the level of material change required has been contrasted to be similar as in the cessation context. Nevertheless, a claim or even previous finding of past persecution does not enjoin the applicant with the burden of proof which he or she carries with the low standard of proof throughout the procedure.

In German practice, if the applicant has been able to convince the court on the existence of past persecution or it has not been a matter of dispute in the first place, a presumption of the existence of the risk is formed which shifts the burden of proof to the state. The shift in the burden should be read in the context of traditional German practices, clearly influenced by its traditional approach to evidence with varying degrees of methods to apply in the assessment. Consequently what the shift in burden of proof includes is a burden of proof in terms of assuring the court on the opposite claim. The standard of the proof for the state to invalidate the borne presumption in German practice is very high: the future risk ought to be predominantly raised even if complete certainty is not attainable. On the content level a change in the country of origin situation ought to be fundamental. Similarly to UK court practice, German academics have referred here to similar reasoning as in cessation of a refugee status. Also, the principle with a shift in the onus is applicable in the context of subsidiary protection. The shift in burden is made due to the humanitarian character of asylum and the serious suffering inflicted on the person in the past, implying that it is used also as a means to balance in the process in order to avoid an unnecessary additional evidential burden for the appellant.

It can be argued that the legal tradition has a linkage to the evidential standards used in the procedure of refugee determination in cases concerning past persecution in the practice of the two comparative countries. The design of the procedure affects the use of evidential standards as exemplified above, evening out the atypical procedural setting and responding in alternative ways to evidential challenges in asylum cases. An example of this is the practice of shifting burden in Germany, whereas such an evidential tool does not fit easily to the adversarial setting of the UK legal tradition. A clear example of the reluctance to use such shifts in the burden of proof in cases concerning claims of past persecution is the case of *Adan,* where the UK tribunal

explicitly ruled out such an approach if the case is not *de facto* comparable to cessation of a refugee status. In German legal practice, where use of differing types of burdens of proof has evolved within the tradition and is a stabilized tool in general, shifts in burden of proof in cases of past persecution can be seen as a natural product of traditional judicial practice.

5. Conclusions

This study has examined the allocation of the burden of proof and its content, as well as the quantum of proof i.e. the standard of proof in cases with claims of past persecution in the European framework for international protection, and has explored the evidential value attached to past persecution. In the first parts of this study the ECHR and the practice of the ECtHR concerning *non-refoulement* and the EU asylum law system – which in the European region orchestrates the national practices on asylum matters – were presented by focusing on the case law of the two main regional courts. Both courts have contributed highly valuable legal material and have developed evidential principles and standards in the form of binding judgements for national courts to follow when deciding on asylum cases. The approach of the regional courts to the burden of proof and allocation of standard of proof in cases of international protection have differences as well as similarities. Both courts have emphasised the need for a shared burden of proof in which both of the parties carry obligations in terms of evidence in the process. Both courts also place the initial burden of proof on the applicant, while this burden does not reflect a legal burden in a strict sense in the practice of either of the courts. On the other hand the content of the benefit of the doubt differs in EU law and in the court practice of the ECtHR. In EU asylum law the benefit of the doubt includes restrictions that are not regarded in a similar manner by the ECtHR. Vulnerability of asylum seekers is also approached from different angles within ECtHR practice and EU asylum law: both of them recognise the structural inequalities which affect vulnerability of asylum seekers in different contexts. Nevertheless, the vulnerability in EU asylum law is approached from the view point of the directive in question. This means that the vulnerability in APD is regarded as something that can be fixed by providing procedural safeguards, whereas in the ECtHR the vulnerability of the asylum seeker has been linked to the peculiar legal status in general. The present writer finds it necessary to point out that not all procedural challenges in refugee status determination are the kind by nature that could be fixed by procedural support when it comes to evidence assessment in a real life practice, but require a sensitive approach taking into account the special position of the applicant as a witness in his or her right when apportioning an appropriate standard of proof. This has been noted in the practice of both of the regional courts in cases concerning past persecution.

As has been demonstrated in this study, when an indication of past persecution arises or the claim concerning it is not a matter of dispute, such an indication carries a particular evidential weight within the practice of European regional courts, whether it is looked at through the lens

of the principle of *non-refoulement* in the ECHR or that of the CEAS legal instruments. The recent jurisprudence of the ECtHR concerning past persecution and the principle of 'strong indication' of a future risk, borne out in the said continuum of case law, requires in explicit terms that such an indication moves the evidential onus to the State to declare why such a risk will not occur in the future. It can also be argued that EU asylum law implicitly similarly places a certain responsibility for the State to give 'reasons' why persecutory acts would not reoccur when past persecution as 'a serious indication' for future eventualities has emerged. Nevertheless, the application in national practice has varied in this regard due to procedural autonomy and principle of subsidiarity. It must be highlighted though that neither of these principles function without limits. The purpose of the regional courts is to ensure the effective implementation of the rights and legal obligations contained in the convention or other legal instrument, the application of which they are entrusted to supervise. National practice that hinders the objectives of these legal rights and principles would run counter to the obligations the national authorities are bound by.

By drawing comparatives from two selected national asylum appellate practices, those of Germany and the United Kingdom, this study has demonstrated variations in the practice of courts from different national frameworks. The procedural settings, linked to legal tradition, influence the evidential method and standards employed by the appellate courts in the adjudication of cases of past persecution. Thus, it has exemplified the initial hypothesis that the legal tradition has an impact on how the European normative framework concerning past persecution as an 'indication' of a future risk is applied in practice, and how this practice can consequently differ among the states.

Based on its findings it can be noted that one key issue here is the type of evidential method that provides the best fit into the legal culture of the country in question. There are no explicit rules in international refugee law as to the procedure or an approach of evidential method.[385] To be more precise, it does not provide clear normative guidance as to the means by which ground facts should be balanced and ruled out and how calculation of the final equation should be conducted in asylum procedures even if its approach in general resembles that of a holistic one. Also, the European Union framework is not clear on the matter. On the other hand, it has been argued that the two stage procedure employed by the CJEU entails that both stages have their own standard of proof, one establishing the ground facts and the other to measure the

[385] UNCHR, Note on Burden and Standard of Proof in Refugee Claims, paras 2-3.

future risk.[386] It has also been interpreted that discretion on such specific methodological aspects falls under the principle of procedural autonomy contained in the European Union law.[387] The UK has been reluctant to add additional stages to the assessment or use shifts in the burden of proof, a tendency that can also be detected in the practice of other common law countries.[388] Then again, the two-stage approach provides a means to use evidential tools that properly suit the practice of civil law countries, especially ones where the courts are comfortable using such a structural approach.

Not all the common law and civil law countries follow the same design of procedure, especially when it comes to asylum procedure. The regional legal space of Europe consists of a variety of national asylum procedures using adversarial or inquisitorial features in varying degrees.[389] In the design of the procedures and evidential solutions the state authorities, as well as judges as normative agents, tend to seek legal ideas from other state practices, especially the sub-regional ones. As exemplified by Byrne, Noll and Vedsted-Hansen, the European legal standards are not mere replications from *acquis communitaire*, as ever since the beginning of the CEAS the background policies behind the ideas have developed through a bottom-up ripple effect having their origins in national practices.[390] It can be argued that a similar ripple effect has been in play in the background of the principle of serious indication in Article 4.4 QD, which, as has been exemplified, does resemble earlier German practice[391]. Nonetheless, to confirm the approach additional research would be needed which would go beyond this study. On this point it is still worth noting that similar reference to "good reasons to consider that such persecution or serious harm will not be repeated" does not exist in its counterpart in soft law instruments of

[386] International Association of Refugee Law Judges – Europe 2016, p.80 (footnote).
[387] *AMM and others* (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC), paras 220-221.
[388] In addition to the UK, the common law countries have been noted to apply a low standard of proof in general in the process, even if the current Irish practice has now recently recognized a higher standard of proof, that of balance of probabilities coupled with the benefit of the doubt (which can lower the standard when needed). The case of Ireland also noted a need for a two-stage approach, but did not make any implications on how past persecution should be regarded as part of the assessment. The case of Ireland shows that the evidential method is at a timely stage where mutual ground is being sought. High Court: ON -v- Refugee Appeals Tribunal and others, [2017] IEHC 13, 17 January 2017.
[389] This makes the asylum procedures very differing from other procedures as well as other legal fields, and thus can be regarded as hybrid procedure as characterized by Noll 2005b, pp. 3-4.
[390] Byrne, Noll and Vedsted-Hansen exemplify how the safe country concept has developed as a national policy practice in Austria, and developed into a legal norm in Danish legal practice and has rippled around the sub-region, eventually becoming a standardized practice in the CEAS, Byrne, Noll and Vedsted-Hansen 2004, pp. 359-362.
[391] Similarly as Staffans 2011, p. 239; contrary to Hathaway and Foster who argue that similar presumption of a future risk as in German national law was ever intended to be included in EU law. Hathaway and Foster 2014, pp. 166-167.

international refugee law.[392] Even if the ECtHR sought inspiration from a UNHCR handbook, it is noticeable from the ruling that the principle of strong indication was especially inspired by EU asylum law, which was consequently emulated to fit to the Court's earlier case law concerning a shift of the onus in the process.[393]

All in all, it is a firmly established legal requirement that past persecution has an important and weighty role in the assessment of the likelihood of a future risk in the European legal framework concerning asylum. Past persecution as a sole reason is nonetheless regarded as not to suffice for granting international protection. The present writer nevertheless finds it important to highlight the gender sensitive reading on continuous effects of past persecution by Baroness Hale of Richmond in the case of *Hoxha*. The notion of ongoing persecution has its roots in national practice of common law countries, even if there is now a tendency to erode the option from domestic frameworks.[394] In Ireland such practice recently had standing in cases concerning past victimization to the most graves forms of mass atrocities constituting violations of international humanitarian law, and past persecution can still be provoked in the cessation context.[395] The persecution ought to be regarded as a wide norm. Consequently, there is no legal obstacle for the states to employ a more beneficial approach in cases where the consequences of victimization so demand, and in some specific cases the EU law also explicitly requires so.

Because of its de *lege lata* approach the purpose of this study was not either to propose unequivocal criteria to evidential standards in cases concerning past persecution or recommend any one specific evidential approach over another. Certainly both approaches as to evidential methods have their advantages and disadvantages. Dividing the assessment into two strict

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[392] UNHCR soft law material proposes that past persecution is regarded as having a strong evidential weight but does not stipulate evidential duties in this regard, even if it generally recognizes the principle of shared duty in evaluating all relevant facts of the case. UNHCR Note on Burden and Standard of Proof in Refugee Claims, para 19.

[393] It is clear from the ruling of *J.K and Others v. Sweden* that the Court draw inspiration from the serious indication in the QD Art 4.4. See *J.K and Others v. Sweden*, para 100.

[394] Hathaway and Foster exemplify the background of this reading in US practice, 2014, pp. 163-164. A similar provision was included in Irish national legislation, which provided that: "The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.*"* S.I. No. 518/2006 - European Communities (Eligibility for Protection) Regulations 2006, Section 5.2. The compelling reasons were omitted in from the International Protection Act 2015.

[395] *M.S.T and J.T. v. Minister for Justice, Equality and Law Reform*, 4 December 2009, para 32. As can be detected from *S.M and the Refugee Tribunal* the court applied a high threshold in evaluating the severity and context of previous ill-treatment in practice. Compelling reasons, including past persecution, can still prevent a cessation of a refugee status under Section 9 of the Protection Act.

stages carries a risk of ruling out facts from the final equation that should not in fact be ruled out. This is a natural consequence since the material to evaluate the second standard of proof, no matter how low it is put, has to first get through the higher standard of proof in the first stage. Also, from practical point of view, it can complicate the process if the stages are defined in absolute means, because some ground facts with lower evidential value can be inseparably connected to ones with higher values. The risk of the so called "contagious effect" can consequently increase.[396] On the other hand, separation of stages can potentially ensure increased clarity in a process by creating a more detailed 'map' to follow while conducting the evaluation. Also, it has been demonstrated that the criteria for justifiability to take a case under the judicial review of courts where the review is limited to questions of law only becomes confused, because the diving line between questions of facts and questions of law in an asylum case is not always easy to detect.[397] When used properly, a two stage approach can offer more clarity in this sense.

It needs to be highlighted nonetheless that what is fundamental is to remain conscious of the evidential methods available as to follow a justified path for a reasoned decision. It is difficult to see how the quality of the adjudication process can fulfil the required European standards without such objective specification. This is especially so in a legal field under the process of approximation where commonly used legal terms and notions do not connote similar content in other national practices. It has been revealed that when establishing the ground facts in asylum process a variation of terminology is used. Where some countries require that facts are merely "substantiated" others seeks "sufficient implications" or "adequate indications", and some frameworks require judges to be "satisfied" while some "convinced".[398] Arguably then, there is no accepted common standard in state practice as to the ground facts. In practice, different interpreters consider the contents of semantics differently and sketch the demands for standards accordingly.[399] A certain level of subjectivity in the analysis consequently always remains. Obviously, this type of problem is prevalent in every type of adjudication of law. Nevertheless,

[396] "The contagious effect" is a phenomenon that can be detected occasionally in asylum decisions where lower credibility of some facts undermines the probative value of facts that generally are substantiated. See on this aspect, a Partly Dissenting Opinion by Judge Zupančič in J.K and Others v. Sweden, Judgment (Fourth Section) 4 June 2015.

[397] See study on Danish high court practice in this regard by Jens Vedsted-Hansen 2005, pp. 57-63.

[398] Summary Conclusions: "Expert Roundtable on Credibility Assessment in Asylum Procedures" 2015, paras 57-58.

[399] As noted by Staffans what is considered reasonably likely is "linked to the background and experiences of the evaluator", 2005, p. 207. Also, as noted before, the civil law understanding of standard of proof includes subjective evaluation on objective criteria.

the seriousness of the consequences of an erroneous decision in an asylum case fundamentally differs from other fields.

Both the ECtHR and CJEU place explicit requirements in terms of procedural quality on the national authorities when conducting evidence assessment. This control has the potential to impact also on a deeper level regarding questions of evidence in the asylum adjudication procedure by states. As noted by some observers, the CJEU has tended to be more cautious in its approach, often referring to the APD which leaves a margin of appreciation for national governments in procedural issues, while the approach of the ECtHR has generally been more proactive.[400] The principle of subsidiarity does prevail in the practice of the ECtHR if the object and purpose of the Convention and safeguards of Article 3 so require, which is the principle tool of the ECtHR in "keeping refugee law in line" in the European area.[401] The continuum of the case law of strong indication of a future risk with a shift in evidential onus for the state will thus provide the minimum standard to which the currently ongoing harmonization process under the CEAS ought to adhere. Consequently, as an established principle it has indirect effects on national practice even if the obligation to 'give serious reasons' in Article 4.4 would be omitted in the ongoing CEAS reformation process. Also, the approach of the ECtHR ought to work as a yardstick for national practice in general. Thus, if the quality in the reasoning in a case concerning past persecution is questionable, the national court ought to engage itself in a full review.

[400] Costello and Hancox 2016, p. 385.
[401] Lambert 2014, p. 208.

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